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12/
June 17

REPORTS

OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

EASTERN, MIDDLE AND WESTERN
DIVISIONS.

JERE BAXTER,
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OF TENNESSEE.

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EASTERN DIVISION.

ROBERT McFARLAND.

MIDDLE DIVISION.

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WESTERN DIVISION.

THOMAS J. FREEMAN.

ATTORNEY GENERAL:

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BROWNSVILLE, TENN.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

WESTERN DIVISION.

JACKSON, ... APRIL TERM, 1876.

N. C. PERKINS, Clerk, *v.* THE STATE.

COSTS. *Clerks. Fees. Section* 4551. *Subsec.* 10, 3220, 5570, 4560. *Subsec. Construed.* Several questions of Clerk's costs are decided in this case, too numerous to be set out in head note.

FROM SHELBY.

Appeal from the Criminal Court. T. H. LOGWOOD, Judge.

L. B. HORRIGAN for Perkins.

ATTORNEY-GENERAL HEISKELL for the State.

DEADERICK, C. J., delivered the opinion of the Court.

Certain fees were allowed by the judge of the criminal court to its clerk, which were excepted to by the Attorney-General, and brought to this court upon his appeal.

1. A fee of twenty-five cents for the retaxation of costs accruing before the magistrate is allowed.

It is insisted that no such fee is allowed by the statute, while the clerk insists that it may be maintained by subsec. 101 of sec. 4551 of the Code. That subsection allows a fee of twenty-five cents "for each order, or motion and order thereon." The allowance is made by a general order of the court for the examination of justices' warrants and the retaxation of the costs, not for entering any order or motion directed to be made by the court. Nor do we think that sec. 3220 of the Code confers any discretion upon the courts to allow costs to be taxed against the State which are not expressly authorized. This section only authorizes the court to exercise its discretion in adjudging costs as between the parties which have clearly accrued, if any case should occur where the law has not directed how they shall be adjudged, but confers no power to allow costs to officers which the law has not allowed.

2. Where the Attorney-General makes a motion for forfeitures upon a bond, recognizance or subpœna to testify, and such motion or order is entered, a fee of twenty-five cents is allowed for such entry. This

fee, we think, was properly allowed under sec. 4551, subsec. 10.

3. In cases of forfeitures on bail bonds, recognizances, or subpœnas, and on motion the forfeiture is set aside without more, a fee of twenty-five cents is allowable under subsec. 10–20 of sec. 4551. If set aside upon condition of defendant's paying the costs, then the costs should be adjudged against him in the first place, and if uncollectable, to be taxed to the State. The judgment is a final adjudication against a right claimed and prosecution instituted by the State, and is necessary to determining that suit or claim of the State.

4. While the clerk is required to certify a copy of the judgment and bill of costs, with the certificate of the Attorney-General and Judge, by sec. 5570, there is no allowance to him for making said certificate. The fee allowed "for every certified copy of order," sec. 4560, subsec. 5, does not authorize the charge. His certificate is in no sense a "copy of" any order.

The criminal court judgment will be reversed as to the first and fourth fees allowed by him. The judgment will be affirmed as to the second named fee, and as to the third as indicated in this opinion. Perkins will pay the costs of this court.

J. W. Sharp *et al.* v. W. D. Fly *et al.*

Vendor's Lien. *Mortgage. Deed of trust. Sale of land. Registration. Statement of case:* A vendor sells and conveys land by deed absolute upon its face acknowledging the full payment of the purchase money, and this deed is duly registered. A creditor of the vendee desiring to obtain security for a pre-existing debt, procured the vendee to execute a deed of trust upon the land to secure the debt, the deed stipulating for delay as usual upon the part of the creditor. The benefits of this deed were formally accepted by the trustee, and creditor joining in its execution, the deed was then duly registered. Some years afterward, when the trustee was proceeding to advertise the property for sale under the deed, the vendor files his bill claiming a lien for unpaid purchase money, and claiming priority over the trust creditor. *Held*, that a vendor who has thus conveyed without reserving an express lien, has no specific and fixed lien upon the property, and acquires none until his bill is filed for the purpose; and if, before this be done, any other creditor secures a fixed or specific lien upon the property, he will prevail over the vendor, and a creditor who accepts a deed of trust to secure a debt stands in this attitude.

Cases cited: Wetmore v. Brien & Bradley, 3 Head, 723; Mackreth v. Symmons, 10 Hum., 375; Hamilton v. Gilbert, 2 Heis., 682; Burrow v. Carter, MS., Jackson, 1871; Cleveland v. Martin, 2 Head, 128; Tatlock v. Harris, 3 Tenn., 180; Brown v. Vanlier, 7 Hum., 249; Green v. Demoss, 10 Hum., 371; Ellis v. Temple, 4 Col., 315; Fain v. Inman, 6 Heis., 10; Eskridge v. McClure, 2 Yer., 88; Lincoln v. Purcell, 2 Head, 143; Dishmore v. Jones, 1 Col., 554; Gann v. Chester, 5 Yer., 205; Roberts v. Rose, 2 Hum., 145; Langford v. Fly, 7 Hum., 585; Farnsworth v. Bill, 5 Sneed, 531; Washington v. Ryan, Nashville, see reports; Wills v. Harris, 3 Head, 382; Furman & Co. v. Fisher, 4 Col., 625; Farquharson v. McDonald, 7 Heis., 404.

FROM GIBSON.

Appeal from the Chancery Court. — John Somers, Chancellor.

J. T. CARTHEL for plaintiff.

SPL. HILL for defendant.

SNEED, J., delivered the opinion of the court.

The tract of land in controversy was originally sold by Lannum to Sharp by deed, with reservation of a lien for the purchase money unpaid. This deed was not registered. The complainant, Sharp, sold without conveyance to Hale and Clements, and thereupon, by an arrangement between the several parties, Fly became bound to Sharp for balance of Hale and Clements' purchase, and Sharp, in writing upon his unregistered deed from Lannum, directed Lannum to execute a deed directly to Fly to the land, and surrendered Lannum's deed to him for cancellation. A deed was thereupon executed by Lannum to Fly, without reservation of lien, and acknowledging payment of the price. By this arrangement the complainant, Sharp, came to be the owner of a note for $4,000, executed by Fly, to which Branch signed his name as joint obligor. The deed by Lannum to Fly was executed and delivered on the 3d of September, 1860, and registered on the 6th of the same month and year. No lien was reserved, as already stated, upon the face of said deed, and the price of the land was admitted to be paid. This note of $4,000 fell due in December, 1861, and is for the balance of the purchase money due to Sharp, the debt of Lannum, on account of the original purchase by Sharp having been long since paid. About the 14th of December, 1860, Fly being

very largely indebted to E. M. Apperson & Co., conveyed the land in controversy, and a large amount of other property, to W. S. Jones as trustee, to secure said debts. The deed was signed by Fly, the maker, and by Jones, the trustee, and its benefits accepted by the beneficiaries, E. M. Apperson & Co., who signed their names thereto, and it was at once registered in Gibson county, where the land lies. The trustee, Jones, upon default of payment, proceeded in time to sell portions of the property and credit the debts secured *pro tanto;* and he having died in 1864, the defendant, Quigley, was afterward appointed trustee, and proceeded to close out the trust by a sale of the property. Thus the whole of the property was, from time to time, sold under the provisions of the trust, except the land in controversy. A large amount of this property, all, indeed, except the land in controversy, was sold to one Green Williams, who thereupon executed a deed of trust to A. Delap on the same property to secure the deferred payments, which were two notes of $23,000 each. Upon closing out this trust of Green Williams, there was still a large balance due to Appereon & Co., much of the personalty having been lost by the war; and in December, 1867, the trustee, Quigley, proceeded to sell the land in controversy for its payment, and the same was purchased by Apperson & Co., and credited upon their debt. In May, 1867, however, the complainant, Sharp, with Lannum as co-complainant, filed his bill, making Fly, Branch and the trustee, Quigley, defendants, to enforce his alleged vendor's lien upon the land for the

unpaid note of $4,000. This bill was demurred to upon the ground, among others, that the beneficiaries were not made parties. The demurrer was sustained, with leave to complainant to file an amended bill, which was done accordingly. The amended bill charges a fraudulent combination between the parties to the trust to cover up the property of Fly, and thus defraud his creditors, and relies upon this ground of relief as well as that of the vendor's lien, as set up in the original bill, and charges that Apperson & Co. had actual notice of the existence of said lien before the execution of the trust. In the progress of the cause the defendant, Branch, put in a cross-bill claiming to be a partner of Fly in the purchase of the land in controversy, and insisting upon his lien as such upon the land for his interest in the unsettled partnership. In the progress of the cause also the defendant, Fly, was permitted to plead and rely upon his discharge in bankruptcy. All the defendants deny the fraud imputed to them, and assert that the transactions were fair and *bona fide*, and the defendants, Apperson & Co., very positively deny all knowledge or suspicion that the complainant or any other person had a lien upon the land so conveyed. But there is testimony that after the conveyance the trustee, Jones, admitted that he was advised or was of opinion that the complainant's note was a lien on the land at the time the deed of trust was executed. These are the general features of the case without unnecessary detail, and the statement is perhaps sufficiently full to illustrate the equities of the parties.

It will be seen from these facts that the main question to be determined is, whether the complainant, Sharp, has a vendor's lien on the land which can overreach the interest acquired by Apperson & Co. by virtue of the trust. This question must be decisive of the case, as we are unable to see any ground whatever upon which to impute any fraudulent purpose or contrivance to the defendants, Apperson & Co., throughout these complicated transactions, nor can we discover in the case any foundation for the claim of Branch upon this land upon the score of his alleged partnership. The whole case must turn upon the question whether the complainant had an actual subsisting lien at the time the lien of Apperson & Co. attached, and the question whether, in such case, notice to the trustee of the complainant's claim was notice to the beneficiaries, will be immaterial if it should turn out that the complainant had no lien at all, whatever might be the opinion or information of the trustee to the contrary. 3 Head, 722; 10 Hum., 375.

It seems to be settled that where there are several successive alienations of land, and the final conveyance is made by the first vendor to the last vendee, the last vendor, all intermediate liens being discharged, is substituted to the rights of the first vendor, and may enforce his lien for unpaid purchase money as against his vendee. *Hamilton* v. *Gilbert*, 2 Heis., 682; *Burrow* v. *Carter*, MS., Jackson, 1871; 1 Hilliard on Mort., 678. The question of the vendor's lien depends not upon who executes the title,

but who sold the land to the defendant against whom the lien is sought to be enforced. It is contended on the part of the complainant that the execution of the deed of trust by Williams to Jones upon most of the property conveyed by Fly to Jones was, in legal effect, a merger or novation of the debts due to Apperson & Co., and operates as an extinguishment of Apperson & Co.'s interest in the assignment by Fly to Jones. There are several reasons why the doctrine of novation can have no application in this case. In the first place, no such case is made in the pleadings. Secondly, it does not appear affirmatively that the property conveyed by Williams to Delap to secure the deferred notes of $2,300, each was of value sufficient to extinguish all of the debts of Apperson & Co. Thirdly, no such intention to release the lien on the land conveyed to Jones and not sold to Williams, is made to appear, and this intention is never to be presumed. But the fact stands to rebut such an intention, that much of the property conveyed by Williams to Delap was lost during the war, that Apperson & Co. did not release or quit-claim their rights in the land in controversy, and that there is still a large portion of Apperson & Co.'s debt still due after the foreclosure of Williams's trust. It is a familiar principle that a mortgage being given as a security for a debt, the general rule is that no mere change in the mode and time of payment, nothing short of the actual payment of the debt, or an express release, will operate as a discharge of the mortgage. The lien lasts as long as the debt. 2

Head, 128; 13 Gray, 170; 13 Sm. & M., 393; 1 Hilliard on Mort., 482. So it is held that a sale of mortgaged property, under a power given in the mortgage, and the taking of the purchaser's twelve months' bond for the purchase money, does not, by the laws of Louisiana, operate as an extinguishment of the mortgage debt. *Union Bank* v. *Stafford*, 12 How. U. S., 327. The doctrine of novation in the civil law is but the doctrine of merger in the common law—"the substitution of a new obligation for an old one, which is thereby extinguished." It was a principle in the civil law that there must be an express intention to novate the *animus novandi*. A novation is never presumed. A case of novation at common law is put in *Tatlock* v. *Harris*, 3 Tenn., 180: "If A owes B £100, and B owes C £100, and the three meet and it is agreed between them that A shall pay C the £100, B's debt is extinguished, and C may recover that sum from A." But it must appear in every case that the taking of other securities or liens, or any change in the time or manner of payment was intended by the parties as a shifting of the liability from one debtor to another. Thus it is held that the delegation by which the debtor gives to the creditor another debtor, who obliges himself toward such creditor, does not operate a novation unless the creditor has expressly declared his intention to discharge the debtor who made the delegation. 13 La. Am., 238. Now it cannot be pretended that the defendants, E. M. Apperson & Co., have in any manner whatever intimated a purpose to relinquish the security

they held for the balance of their large debt by the transaction between Jones and Williams. Even if they had become parties to said trust by signing the same, no presumption could be raised that they intended to relinquish their lien upon the land in controversy, in the absence of any such express intention, or of any circumstance whatever to indicate such a purpose. On the contrary, the very fact that they retained their original lien on the land in controversy, under the circumstances, must be accepted as a circumstance to show a contrary intention or a sagacious foresight that much of the property conveyed by Williams to Jones was not the best indemnity for debt in the aspect of public affairs then existing. The case is simply that of a creditor, having just debts secured by mortgage on all his debtor's property, sells off a part of it and takes a trust upon it from the purchasers, and it turns out that this is not enough to pay his debt, upon what principle of equity can he be precluded from looking to the balance of his original security to save the unpaid balance? Unless he has manifestly intended to give up his original indemnity, we cannot presume it. Such, as we have seen, is the concurrent doctrine of both the civil and the common law upon this subject.

This brings us to the consideration of the question whether, under the facts, the complainant had a lien upon the land in controversy. The conveyance under which he claims it is upon the records of the county, reserving no lien and acknowledging upon its face that there is no purchase money due. The de-

fendants, being just creditors in a large amount of money, take a deed of trust upon this and other property, and they accept the trust and become parties thereto by signing the same. They have actually gone forward through their trustee in closing out said trust to the extent of selling all the property included therein except the land in question; and the bill charges and the answer of the trustee admits, that they were proceeding to sell this land in controversy to discharge the unpaid balance of the debt before the bill was filed to enjoin it. It seems to us that these facts vindicate the defendants' right, even within the doctrine of the case of *Brown* v. *Vanlier*, 7 Hum., 249. In that case the deed of trust was made to Wallace Dixon to secure certain creditors, but no steps whatever had been taken to close the trust, nor had the beneficiaries in any way signified their acceptance of the same by signing it or otherwise. The whole argument of that case rests upon the idea that the vendor's bill was filed before any steps were taken to close the trust conveyance. Thus it is said, in that case, that the vendor's equity is such an equity as will be enforced against creditors claiming under such conveyance where the vendor files his bill before any steps have been taken to close the trust conveyance. *Id.* 241. It should be distinctly noted, says the argument, that I am willing to admit that if the conveyance is closed before the vendor endeavors to enforce his equity, or even if the first step be taken in a legal forum by the creditors, such creditors might obtain a priority, although notified of the existence of

the vendor's lien. *Id.* 244. This, we think, states the true doctrine, except that the same effect must necessarily result, whether resort be had to a legal forum or not, in cases where the legal title is vested in a trustee with full power to close the trust without resort to a legal forum, and where he is proceeding accordingly, before the vendor's bill is filed, as in this case. This doctrine has been followed in many cases reported and unreported by this court. *Green* v. *Demoss*, 10 Hum., ——; *Ellis* v. *Temple*, 4 Col., 315; *Fain* v. *Inman*, 6 Heis., 10. It may be well to note that Chancellor Cooper, in his edition of Yerger's Reports, in a note to the case of *Eskridge* v. *McClure*, 2 Yer., 88, refers to the case of *Brown* v. *Vanlier*, 7 Hum., —, and the other cases on the subject, and states his opinion to be that the late cases contain the sounder doctrine, and more consistent with our registration laws.

The confusion which has arisen in professional opinion upon this subject has sprung from the varied interpretations given to the word "executed" in the opinion of Turley, J., in *Brown* v. *Vanlier*. The opinion, as will be seen, adopts the argument, and the argument maintains the doctrine above stated. But the court, in stating the result, uses the word "executed," so that it has been mistaken to mean foreclosed, while giving such a sense to the word is manifestly at war with the doctrine maintained in the argument which is adopted by the court. A trust of this nature is simply inchoate as long as it is a mere private matter between the bargainor and the trustee.

In that chrysalis state it may be revoked by the bargainor. It must be accepted by the beneficiaries, or benefit must be taken under it by them before it is a trust. It is, then, an executed trust, and in this sense, in the opinion of the writer, Judge Turley used the word, and not in the sense of foreclosure, which would put the court in direct antagonism to the argument they had adopted. Thus it is said a trust is executed where the legal or equitable estate passed to the trustee its creation. 1 Prest. Est., 190. So it is said if a debtor voluntarily convey property to trustees for the benefit of creditors, and the transaction is not communicated to them, and they do not execute the deed, and are not in any manner privy to it, the deed operates only as a power to the trustees, and is revocable at any time by the debtor. Hill on Trustees, 130. These and many cases referred to show that the word "executed" is used in the sense of acceding to or accepting the deed. *Id.* 131. So Judge McKinney's explanation of the term is consistent with both the English and American authorities, that an executed trust is one that has become a complete trust by the vestiture of the rights it purports to create. Before the creditors have elected to take under the deed, the assignee is rather the trustee for the debtor than for them; when they have accepted the assignment by claiming or taking a benefit under it, the assignee becomes their trustee, and they assume by virtue of the assignment the character of lien creditors. Or if they have, by filing a bill, or in any other manner made themselves parties to

the assignment, by claiming or receiving a benefit from it before the vendor's bill is filed, they must prevail over the tardy claim of the vendor. 1 White & Tudor's Equity Cases, 250. This equity of the vendor after he has parted with his title without reservation, is not a lien until established by the decree of the court, and must always yield to any intervening lien which has attached before the filing of the bill. Thus it is held that it cannot prevail against creditors claiming under a deed of trust made for their benefit, or under a mortgage, for they have more than an equity or lien—they have the legal title. *Dunlap* v. *Barnett*, 5 Sm. & M., 702.

We need not discuss this subject at length, but refer, for the argument, to several cases decided by this court *ubi supra*. In one of those cases we have recently said, "It is clear that creditors who have acquired a valid, specific lien upon the estate, are not to be assimilated to volunteers and purchasers under the vendee in the sense of the law, and if this floating equity, misnamed in judicial parlance 'the vendor's lien,' be not quite a myth, but a mere capacity to acquire a lien if he chooses, then this same capacity belongs to others who are creditors, and have rights just as meritorious as his. And we hold that the simple knowledge on the part of the creditors that the vendor, sleeping on his rights from year to year, may, if he chooses, acquire a lien as the creditor himself is about to do, cannot, in a forum of conscience, impair the value or affect the validity of the lien so acquired by the creditor. In such case there is no

mala fides, no fraud, no improper advantage taken by the one of the other, but the race of diligence as just creditors being open to both alike, the one has lost and the other won." *Fain* v. *Iseman*, 6 Heis., 12. The result is, that the decree must be reversed and the bill dismissed.

Concurrent opinion, McFarland, J.

The question, in substance, is this: A vendor sells and conveys land by deed absolute, upon its face acknowledging the full payment of the purchase money, and this deed is duly registered. A creditor of the vendee, desiring to obtain security for a pre-existing debt, procured the vendee to execute a deed of trust upon the land to secure the debt, the deed stipulating for delay as usual upon the part of the creditor. The benefits of this deed were formally accepted by the trustee and creditor joining in its execution, and the deed was then duly registered. Some years afterward, when the trustee was proceeding to advertise the property for sale under the deed, the vendor files his bill claiming a lien for unpaid purchase money, and claiming priority over the trust creditor. This is the question to be settled.

The question is very important, and if it is to be regarded as an open one, should receive a thorough consideration in all its aspects. The case of *Green* v. *Demoss*, 10 Hum., decided more than twenty-five years ago, announced a doctrine upon the subject which has been regarded by many of the profession as settling the question, though in fact it may have

been but a *dictum* in that case; it was, however, approved by this court in the case of *Ellis* v. *Temple*, 4 Col., and in *Fain* v. *Inman*, 6 Heis., and repeatedly recognized in other cases—see *Lincoln* v. *Purcell*, 2 Head; *Dishmore*, v. *Jones*, 1 Col—and we think has been generally accepted as the law; but the question now having been reopened, we must determine whether to adhere to the rule thus adopted, or go back to the doctrine which it is insisted was established by the earlier cases.

I am of opinion that the rule, as substantially announced in *Green* v. *Dennos*, should be adhered to; that it is sound in principle, and supported by reason and authority, and is in every view just and equitable. That rule is, that a vendor who has thus conveyed without reserving an express lien, has no specific and fixed lien upon the property, and acquires none until his bill is filed for the purpose; and if, before this be done, any other creditor secures a fixed or specific lien upon the property, he will prevail over the vendor. . And a creditor who accepts a deed of trust to secure a debt, stands in this attitude. This rule, in some of its applications, is conceded on all hands—it was conceded in the argument of this case that the lien of a judgment given by statute will prevail over a vendor, and so the lien acquired by the levy of an execution or attachment, where such liens are acquired before the vendor's bill is filed.

The first question to settle is, what is the nature

of the vendor's equity or lien in such a case? Is it a fixed and specific lien attaching to the land from the date of the sale? That it is not, seems to me to be definitely settled. For if it be a fixed lien attaching to the land before the bill is filed, I see no reason why it should not prevail over all other liens to which it is prior in time, either the lien of a judgment execution or attachment, and even after a sale under execution or attachment, but as early as *Gann* v. *Chester*, 5 Yer., it was said this lien could not prevail over other creditors who might acquire rights to the property. In that case other creditors had obtained mortgages that they had foreclosed, and under which they had bought the property. The same was held in *Roberts* v. *Rose*, 2 Hum., where the land had been sold under execution and bought by a party having full notice that the purchase money was unpaid. And in *Brown* v. *Vanlier*, 7 Hum., in the argument of Judge Cooper, which was adopted as the opinion of the court, it is conceded that "by our registration laws and the policy of this State in subjecting lands to sale by execution for the payment of debts, the lien, as it existed at common law, has been modified, and that by the registration laws the vendor's lien, as every other unregistered lien, is postponed to the rights of judgment creditors and *bona fide* purchasers without notice, . . . that is to say, creditors may acquire rights and enforce them, if they are diligent, without noticing the vendor's lien." That the lien of a judgment execution or attachment, if prior in time to the filing of the vendor's bill, will

prevail, I think, has long been regarded as settled, and in fact was not denied by the learned counsel who argued this cause. See also *Ellins* v. *Temple*, 4 Col.

It was argued, however, that the lien of judgment execution or attachment is superior to the lien of a vendor before bill filed, only because made so by statute. But this is evidently a mistake, as there is no statutory provisions declaring such liens superior to any other. Such liens are given by law, but are not declared superior to any other lien. This results from the nature and force of the conflicting claims. If, however, the vendor's equity be a fixed lien on the land, it should certainly prevail over the lien of a judgment execution or attachment; and I am likewise unable to see why it should not prevail over a trust creditor or mortgagee who has foreclosed his deed of trust or mortgage and bought the land for his debt, or over a purchaser at execution sale. If the vendor's lien was superior to the mortgagee before he had foreclosed and bought the land, or had begun proceedings for that purpose, why is it not equally so afterward? How is the mortgagee's rights as against the vendor, after he has thus bought the land, any stronger than before, as he has not become an innocent purchaser? An express lien retained by the vendor in his deed would not be thus defeated by a mortgagee; and if the implied lien be regarded as a fixed and specific lien, it certainly could not be thus defeated by a sale and purchase by the mortgagee, or by a sale under execution or attachment. But this

court decided in *Fain* v. *Inman*, 6 Heis., without dissent, that where the trust creditor had caused the trust deed to be foreclosed, and had bought the land for his debt before the vendor's bill was filed, that the former should prevail. It seems to me that if the mortgagee's claim be inferior to the vendor, he cannot make his claim superior by taking steps to foreclose his mortgage or deed of trust, unless possibly such superiority be acquired by force of judicial proceedings instituted, but in *Fain* v. *Inman*, the creditor caused his deed of trust to be executed, and became purchaser without judicial process.

Strong objection is made to the doctrine that the lien of the vendor in such case is only an equity or right to file a bill, and that his lien only becomes fixed by filing of his bill. This, it is said, is giving him the right to file a bill to enforce a lien when he has no lien to enforce that which he has not. Other instances might be cited in which the right is given to resort to a court of equity, and a lien acquired only upon the filing of the bill. These cases are statutory, it is true, but it shows there is nothing objectionable in such a rule. Besides, the rule that the filing of the vendor's bill fixes his lien, is certainly well settled. As before stated, it is well settled that the lien of a judgment execution or attachment, if acquired before the filing of the vendor's bill, will prevail over it; but if the vendor's bill be filed first, it is equally clear that it will prevail. So that the proposition that it is the filing of the bill that fixes the lien of the vendor, although denied in

its application to a case of conflict between such lien and that of a mortgagee, is not denied in its application to other liens on the property. If the rule be sound in one case, it must be in the other. So that this part of the proposition is undoubtedly sound, as is virtually conceded in the argument of Judge Cooper in *Brown* v. *Vanlier*, 7 Hum., which is the principal authority relied upon to support the contrary view. The only question then remaining is, whether a creditor who accepts the security of a deed of trust duly registered to secure a pre-existing debt, thereby acquires a valid and fixed lien upon the property. I maintain that this proposition cannot be resisted. The argument of Judge Cooper in *Brown* v. *Vanlier* was, that our registration laws only protected creditors and *bona fide* purchasers without notice from the secret or unregistered lien of a vendor, and that the creditor claiming under a voluntary assignment made by a failing debtor to secure a pre-existing debt, was neither a creditor nor a *bona fide* purchaser without notice; not a creditor because he had no judgment, and not a *bona fide* purchaser because he has parted with nothing on the faith of the conveyance; but he admits that there is a clear distinction between creditors who claim under a general assignment made to assignees by a failing debtor for the benefit of all his creditors and a creditor to whom a conveyance has been directly made to secure contemporaneous advances, or in satisfaction of pre-existing debts, and refers to section 1229, Sto. Eq. Jur. This section, and the preceding, shows that there is a clear distinction between a gen-

ral assignment, as to assignees in bankruptcy, and a particular assignment to specified creditors for their security or satisfaction. The latter will be protected if without notice, and I should say, even if be to secure pre-existing debts, if further time was given on the faith of the security, and upon this ground this would be to put the mortgagee upon the footing of a purchaser without notice. But I put the mortgagee upon the footing of a creditor, and not a purchaser, and I apprehend the error in the argument of Judge Cooper is, in assuming that the word creditors, as used in the registration laws, means only judgment creditors. Such, at that time, seems to have been the meaning given to the word creditor, as used in the act of 1801 against conveyances to defraud creditors. *Langford* v. *Fly*, 7 Hum. This was overruled by *Farnsworth* v. *Bell*, 5 Sneed and Patrick Ford, note; and this meaning was perhaps attached to the word creditor in other statutes, but no such limited meaning is now attached to the word, at least I think it should not be so limited in its application to a question like the present.

The argument of Judge Cooper concedes that the creditor might acquire rights in the property without noticing the vendor's lien, but that he is not a creditor unless he has judgment. But this proposition cannot now be maintained. That a creditor without judgment may, by virtue of a deed of trust or mortgage executed for his benefit and accepted by him, although for a pre-existing debt, acquire a fixed lien upon the property, is now well settled. Such a lien

has been several times held to be superior to the lien of an attachment, and in a recent case at Nashville of *Washington* v. *Ryan*, opinion by Judge Deaderick, goes so far as to hold, as does also the case in 4 Col., that the presumption of law that the beneficiaries accept the benefits of the deed, nothing being alleged to the contrary, will be sufficient to give the trust creditors priority over an attachment. Other cases referred to in that opinion left this question in doubt, but all concede that if the creditors in fact accept before the attachment is levied, they will prevail. See *Wills* v. *Harris*, 3 Head, 332; *Furman & Co.* v. *Fisher et al.*, 4 Col., 625; *Farquharson* v. *McDonald*, 7 Heis., 404. These cases are not put upon the ground that the mortgagee or trust creditor are purchasers without notice, but they are put upon the footing of creditors. Their claims were pre-existing debts. It is insisted that a trust creditor can only obtain priority over a vendor by executing his deed of trust, or by taking steps to execute it, not by merely accepting it; that such was the holding of the court in *Brown* v. *Vanleer*, and so it seems to have been. But the cases last above referred to distinctly hold that the trust creditor may acquire such a valid lien on the property as to defeat a subsequent attachment by merely accepting the benefits of the deed; and in the last case, if nothing else appears, the presumption of law that he accepts will be sufficient.

By accepting the deed he acquires a lien that will defeat a subsequent attachment, but he acquires no lien against the vendor until he executes his trust

deed, or takes steps to execute it. This seems to be manifestly inconsistent, but the inconsistency does not stop here. As said, these cases hold that a trust conveyance thus accepted by the creditor will give him a lien superior to the lien of a subsequent attachment, and certainly it would for the same reason be superior to the lien of an execution, subsequently levied, or a judgment. But as we have before said, a lien fixed by the levy of an attachment or execution, or the statutory lien of a judgment before the filing of the vendor's bill, will prevail over the vendor. Then how is it possible the vendor is to prevail over the trust creditor who has accepted the benefits of the trust before the vendor's bill is filed? Suppose we should have a case of conflicting claims between three parties, first, in time a creditor who has formally accepted the benefit of a deed of trust upon the property to secure his debt duly registered; second, in time an execution or attachment duly levied upon the land; third, in time a vendor who files his bill to enforce his lien for unpaid purchase. The trust creditor's claim is superior to the attaching creditor, the attaching creditor's claim is superior to the vendor, and yet we are told that the vendor's claim is superior to the claim of the trust creditor. There is no escape from the dilemma unless some one of these positions be abandoned. It seems to me that the only way out of the dilemma is to hold the vendor's lien superior to the others first acquired, simply because it is a secret and unregistered lien. We must either do this or put it upon the ground of a fixed

dien, and then it should prevail against all others, and prevail against all except innocent purchasers without notice.

If this be regarded as an open question upon which the court is required to lay down a rule to be followed in the future, upon which side of the question is the law, the equity? Here is a vendor who sells and conveys his land by a deed absolute upon its face acknowledging the full payment of the purchase money. This goes upon the register's books as notice to all the world. A creditor of the purchaser, desiring to secure his debt, and seeing this deed upon the register's books, accepts a deed of trust, agreeing to give further time upon his debt. He relies upon this security perhaps for years, forbears all other efforts to secure his debt, but finally, when he comes to have his deed of trust executed, the original vendor comes forward with a note for unpaid purchase money, of which no notice was given, and claims priority. He seeks to set up a secret and unregistered lien against the trust creditor, who has certainly a fixed lien on the land; the creditor certainly has the legal title, and at least an equal equity. Take the illustration used in *Gann* v. *Chester*. Suppose the vendor, after making an absolute conveyance without reservation, immediately takes from his vendee a mortgage or deed of trust to secure unpaid purchase money, but neglects to have it registered. In such case it cannot be denied that he would be postponed to a subsequent mortgage or deed of trust first registered. Upon what principle is it that the secret, unregistered lien,

resting only in the parol agreement of the parties, or in the mere presumption of law, shall be held as against creditors superior to the mortgage duly executed but not registered. If the vendor takes his lien in the form of a mortgage duly executed, but not registered, it is bad; but if he allows it to remain in the secret parol agreement of the parties, either express or implied, it is good. It may be said that the creditor might, by enquiry, ascertain the existence of the unpaid purchase money. In many cases this would be impracticable. There can be no danger of injustice to the vendor; it is quite easy for him to put his lien beyond all question, and give notice to the world either by retaining the title or an express lien upon the face of his deed. Regarding the beneficiary in a trust deed as a purchaser, which he may be, where he advances money or releases other securities at the time, notice or want of notice might be material; but regarded as a creditor seeking to secure his debt, the question of notice is immaterial, as the want of notice cannot help him, to give notice cannot injure him, or affect his conscience. The idea of converting an absolute sale and conveyance into a trust for the benefit of the vendor, is a purely arbitrary assumption directly opposed to the real truth of the transaction. So manifest is the want of equity in such cases that many States have abandoned the vendor's lien altogether. And Judge Cooper, upon whose argument *Brown* v. *Vanleer* was decided, now concedes that the latter is probably the better doctrine, and certainly more in accordance with

the spirit of our registration laws. See note to *Eskridge* v. *McClure*, late edition of 2 Yerger. The changes, he says, have been made by the judicial legislation of the latter cases, but the whole doctrine of vendor's lien was established by judicial legislation; it is the creature of a court of equity, and may properly be modified by the same power that created it.

I think the contrary rule would be a decided step backward, and greatly unsettle what is now regarded as the settled law, and moreover, to establish a rule not sound or equitable in itself.

FREEMAN, J., delivered the following dissenting opinion:

This bill is filed to assert a vendor's lien for payment of a balance of purchase money of about $4,000, due by note, signed by W. D. Fly and J. L. Branch. The note is not produced, but is sued on as a note lost or mislaid.

The facts necessary to be stated on this branch of the case are, that Lannum sold the land in controversy to Sharp, and made him a deed which was never registered. Sharp sold to Clements and Hale, and they to Fly. When the last sale was made the parties met, and by mutual agreement the deed from Lannum to Sharp, and title bonds given in the other sale to Hale and Clements, and assigned to Fly, were taken up. Lannum made a deed direct to Fly, and Fly gave the note in controversy to Sharp in discharge or satisfaction of the amount due from Clements and Hale to Sharp, or rather assumed their debt,

giving this note for it. The deed of Lannum is September 3, 1866; no lien is retained on the face of it for payment of the purchase money, the deed having the usual recital of its payment. Fly was deemed wealthy at this time, but failed in a few months afterward, making an assignment in the form of several deeds of trust, December 14, 1860, to W. A. Jones, trustee, to secure a large amout of existing indebtedness to E. M. Apperson & Co., and also are to secure a contemplated advance to Fly of $25,000. The war coming on soon after, no money was ever advanced under this arrangement, so that this deed is out of the case at present. The case is clearly that of a deed of trust conveying this land as a security for a pre-existent debt, and must be decided on this issue.

Before entering on this discussion it is proper to dispose of the question presented in argument as to whether the lien was not waived by taking the note of Fly with Branch as surety. It suffices to say on this, that taking such surety on the note would raise a presumption of waiver of the vendor's lien, nothing more appearing. This presumption, however, may be rebutted by showing that such was not the intention of the parties. That such was not the intention in this case is made out beyond question by the testimony of Branch, showing that a lien was retained on the land in the face of this note thus signed. There is no evidence, so far as we have seen, to contradict this statement.

This brings us directly to the main question inti-

mated above, as to whether a vendor's lien, given by law, where the land is conveyed by deed, can prevail over a conveyance or assignment made and recorded to a trustee, with power to sell the property and appropriate proceeds to the payment of pre-existing debts. In other words, whether an assignment as security for a pre existent debt will take precedence of and override the vendor's lien given by law for the payment of unpaid purchase money.

We now proceed to the discussion of the question on principle and authority. What, then, is the nature of the right of a vendor of land by which he can ask a court of equity to decree its sale for the satisfaction of his debt, and an appropriation of its proceeds to its discharge? When does this right arise and begin to be, at the time of the sale or by filing a bill or bringing a suit? Does it spring up out of the contract of sale, or is it the result and product of suit brought? These questions have in them the elements for the solution of the question involved, if reasoned out in accord with sound legal analogies.

In the leading case, *Macreth* v. *Symmons*, decided by Lord Eldon in 1808, 1 Lead. Cases in Eq., 340, the principle was laid down as the then established doctrine of the courts of equity in England, that the vendor's lien for purchase money unpaid will be enforced against the vendee, volunteers and purchasers with notice, or having equitable interest only, even though a receipt was given or endorsed on the back of the deed, unless this lien was shown to have been relinquished by the vendor. This case was one greatly

considered by the Lord Chancellor, and decided after exhaustive examination of the previous decisions of the court. The doctrine had been put before this in the case of *Pollexfen* v. *Moore*, 3 Atkins, 272, L. C. Eq., 344, by Lord Hardaricke, on the ground that the "vendee was, from the time of the agreement or contract of sale, a trustee as to the purchase money for the vendor." We cite this case to show how the doctrine has been fixed in the jurisprudence of England, from which country we derive it. Since then it has never been doubted, we believe, in that country. The cases are cited in Leading Cases in Eq., vol. 1, 359, and the rule stated that this lien prevails against all persons claiming under the vendee, except innocent purchasers without notice who have paid their money and procured the legal title. In accordance with this view it is held that the assignees of a bankrupt will be affected by the lien, although they may have had no notice of its existence, they taking subject to all the equities attaching to the estate in the hands of the bankrupt. So also will their assigns under a general assignment for the benefit of creditors. L. C. in Eq., vol. 1, 361; Bro. C. C., 302. In notes of the American editor the same doctrine is laid down as prevailing in most of the States of the Union, though some courts recognizing it, considered it a doctrine contravening the general policy of this country against secret liens. *Ibid*, 362–3, *et seq.* So in this State as early as 1831, in the case of *Ross* v. *Whitson*, 6 Yer., 52, these doctrines were held as established beyond all doubt, citing numerous

cases, both English and American. In all the cases it is worthy of remark the right of the vendor is spoken of as a lien, and one growing out of the contract of sale. In the cases *Sherats* v. *Nicodemus*, 7 Yer., 9, and *High and wife* v. *Battle*, 10 Yer., 106, this court held this lien to be a specific one in the nature of a mortgage attaching, says the court, "specifically to the land, whether in the hands of the original vendee or of a purchaser from him with notice." In the latter case, decided in 1836, it was held that no judgment need be obtained at law in order to ascertain the amount of the debt against the personal representative of the deceased vendee, but that the bill would lie against the land, making the heirs alone parties, and this on the principle that the "land was debtor, whether in the hands of the vendee or his heir." *Ibid*, 188. In this form the doctrine was introduced into our State, and thus imbedded in our jurisprudence. Thus it stood, too, at the time, and long after our system of registration had been established and substantially perfected.

These principles being established, it follows that this right is a substantial one, as old as the equity jurisprudence of England, and at an early day fixed into our own system. It is also clear, both on reason and authority, that it springs out of the contract of sale, and results from it, and attaches to the land, the land becoming debtor from this period. If it does not spring up at the time of the contract of sale in the nature of things, when does it spring up? In every bill filed to enforce it, whether you call it

a lien or an equity, the facts to be charged are, that land had been sold, the defendant had purchased and the purchase money remained unpaid. These allegations are always followed with a prayer for an enforcement of the lien growing out of the facts stated, by a sale of the land subject to the charge. Without the allegation of such a sale, no lien would appear, and with this allegation it is uniformly recognized and enforced. Why, then, by a mere change of name, calling it an equity, assume a change of the nature of the right? Is not such an assumption purely arbitrary, with no reason to be given for its basis? Is it not more in accord with the history of this lien and its nature, to say that it is a lien, a long recognized right given to the vendor of land by a court of equity, enforcible as such equitable rights are enforced in a court of chancery, because not recognized in courts of law. We think that it is as substantial a part of the contract in our law as is the note given for the purchase money, and attaches at once in favor of the vendor on completion of the contract. If this be so in principle and authority, how can he be deprived of it? Alone, as we think, by one having a superior equity, such as an innocent purchaser for value; one who has paid his money, parted with something innocently on the faith of the land with no notice of the existence of the lien, or as in case of *Gause* v. *Chester*, 5 Yer., 207, where the deed of trust had been executed by sale of the property before the bill filed, on some similar case.

Thus stood the law in our State, when the ques-

tion was for the first time distinctly presented as to which should succeed, the vendor with his lien, or the trustee and beneficiaries holding the property under a registered conveyance in trust to pay pre existent debts. In that case the argument of Mr. Cooper was based on the proposition, first, that creditors claiming under a voluntary conveyance made to a trustee to secure pre-existing debts, were not "creditors and purchasers under the registration laws; and second, that the vendor's lien would be enforced against such a conveyance, when his bill was filed before any steps taken in enforcement of the trust;" in other words, as he states it: "creditors claiming under a trust conveyance take the property conveyed, subject to any equity which might have been enforced against it in the hands of the assignor." The court, Judge Turley delivering the opinion, states the point decided by the court, in the following emphatic language—language too clear to be misunderstood: "The only question we deem necessary to notice in this case is, whether a vendor of land, when the purchase money has not been paid, can enforce his lien therefor against a trustee and *cestui que trust*, when the land has been conveyed to secure debts, when the bill is filed for that purpose before the trust is executed." "We have no doubt," says the learned judge, "that he may." He then refers to the case of *Pettigrew* v. *Turner*, 6 Hum., 440, as virtually deciding this same question, and then refers to Mr. Cooper's argument as exhausting the subject for the reasons in support of the decisions made.

Thus stood the law until the *dicta* of Judge McKinney, in the case of *Green* v. *Demoss*, 10 Hum., 376, where he states the result of the decision of *Brown* v. *Vanlier* to have been, that the lien was held to prevail against a voluntary assignment by deed of trust for benefit of antecedent creditors, where the bill is filed before anything is done in execution of the trust, or in other words he adds, "before the trust is *accepted*, as was the meaning intended to be conveyed in that case." With deference to the statement of Judge McKinney, it is clear the court intended no such meaning as he gives to the word executed, as the idea of acceptance by the creditors under the deed; no such question was before the court, nor could have been, on the facts in *Vanlier* v. *Brown*. Besides, the court expressly say, that the lien shall prevail, if the bill is filed before the trust is executed, not before the assignment is accepted; thus going further than Mr. Cooper's proposition, that is, before any steps were taken to close the trust—a proposition not well in accord with the main one that follows, that the conveyance is subject to every equity which might have been enforced against it in the hands of the assignor; for if this be the nature of such an assignment, then until the property had been freed from it by a sale in execution of the trust, no preliminary steps could be held to have any effect on the rights of the parties.

This view of the case of *Vanlier* v. *Brown* is taken with emphasis and sustained in an opinion delivered by Chief Justice Deaderick at last term of this court at Nashville. See MS. opinion, *Washington* v. *Ryan et al.*

In this case of *Demoss* v. *Green*, we believe for the first time in our reports, is introduced the idea of the vendor's right being a "mere equity," and not a specific lien on the land until a bill is filed to enforce it. No authority is cited by the learned judge for this distinction. The cases we have cited on this subject in Tennessee definitely lay down a contrary doctrine, that is, that the lien is a specific one on the land, and in some it is said in the nature of a mortgage.

This distinction cannot be maintained, we think, upon any sound principle or legal analogy. If it is not a lien on the land, or if the language is preferred, an equity fixed on the land growing out of the sale, then on what does it fix itself? Is it a lien, or equity, or charge on nothing, that simply exists in idea, until the vendor shall locate it by filing his bill to enforce it? Is it not rather an incongruous view of such a right, that a contract must be alleged by which land has been sold and purchase money unpaid, and then as soon as such a proceeding is instituted and bill filed, immediately the equity locates itself against the particular land, but was unlocated and unfixed before. In other words, that a vendor can raise a right and make it specific on land, that is, attach it to land as a charge, by simply filing a bill for that purpose, alleging a contract of sale and the purchase money unpaid? Upon all sound legal analogies a suit is commenced to enforce an existent right, not to create it. A suit to enforce a lien or equity by sale of particular property, necessarily involves the

pre existence of the right sought to be enforced. In fact, such is the basis of all bills filed in our courts to sell land for payment of the purchase money. It is generally conceded that if this lien be specific, that is, fixed on the land by virtue of the contract of sale, then it must override the right of a voluntary assignee. That it is so fixed and specific is clear, as we think, or else it is a lien existing on nothing, a charge with nothing charged, an equity with nothing subject to it, each proposition involving a legal contradiction. We therefore conclude the lien is specific, fixed and fastened on the land by the contract. It is true, in the case of *Fain* v. *Inman*, 6 Heis., the learned judge delivering the opinion of the court follows in his reasoning the theory of Judge McKinney, in *Green* v. *Demoss*, but the case before him did not raise the question, and consequently it could not have been decided by the court. This is clearly seen by the statement of the question under investigation in commencement of the opinion, which is as follows: "The controversy is between the vendor of land who has sold and conveyed without an express reservation of the lien, and who seeks to assert his lien for purchase money unpaid, and the *purchaser* at a trust sale under the trust deed of the *vendee made and foreclosed* before the filing of the bill." The case of *Gann* v. *Chester*, 5 Yer., had settled this question, and no other was before the court; so that we have no difficulty in that case as an authority in the present, the questions being entirely different. In this case the vendor's bill is filed before a sale under the trust deed, and is precisely

the case of *Brown* v. *Vanlier*, where it was held that the vendor should prevail.

We would arrive at the same conclusion reached above, from the position and character of the claim of a trustee and the beneficiaries under the deed of trust. What is the trustee but a voluntary assignee of the vendee? He is not a purchaser at all, much less an innocent purchaser. While the naked dry legal title is conveyed to him, he is still but an assignee with a power to sell and appropriate to the payment of debts. He is so treated in all our standard writers on the subject. Mr. Story, Eq. Jur., sec. 1288, says: "The lien will also prevail against assignees claiming by general assignment under the bankrupt and insolvent laws, and assignees under a general assignment made by a failing debtor for benefit of creditors, for such assignees are deemed to possess the same equities only as the debtor himself." So it is said by Mr. Burrell, in his work on assignments, p. 352, the conveyance conveys the property "in the same plight and condition as the assignor held it, and will not defeat the pre-existing liens, nor can the trustees be regarded as purchasers, nor the *cestui que trust* creditors within the Registry Acts." Mr. Perry says, "as a matter of course, all persons having liens on the trust property prior to the assignment are not affected by it—their rights remain as before the assignment." Section 596.

These authorities and many more that might be cited, accord precisely with the view we have taken of this question. We add, that according this right

of the vendor to be properly but an equity, the same result would follow, for all agree that a *bona fide purchaser* of property, purchasing and paying his money with notice of an equity, would take subject to the equity, and certainly all the cases and authorities hold this in case of a vendor's lien; all authorities agree that if he purchases without notice, he takes the property fund from the equity. Then the only question is, whether a voluntary assignee is an innocent purchaser or equivalent to one. On this question there has never been a doubt, we believe, and it is universally conceded in this State that he is not an innocent purchaser. If not, then he takes subject to the equity, unless he is protected by registration laws; and this is not insisted on, for if he were within this protection he could at once interpose this as a certain and available defense and thus end the contest.

But it is said, that the opposite view is more in accord with the spirit of our registration laws. Perhaps this may be so, but it is clear beyond all question, and we believe is conceded, that the trustee and beneficiary are not within their provisions. They are not the creditors referred to in these laws, nor are they *bona fide* purchasers without notice, as therein provided for. If they were, then the statute would give the protection and the controversy, as we have said, be at an end. If not included in these laws, may it not be plausibly argued that as the law stood at their passage, with the lien well recognized as a specific charge on the land, the omission to provide for the case left the rights of the parties to stand

precisely as if no such law had been passed? or even amounted to a legislative affirmance, that the law should not be changed as to this question by these laws. The expression of one thing may fairly be held to exclude the other not included in it; not being included in the provisions of our registration laws, not being innocent purchasers or purchasers at all, on what higher ground can these creditors stand than the vendor whose purchase money is unpaid? He, too, is a creditor with a lien or an equity. His lien is prior in time to the assignment. It has in it the highest equity, being the price of the very land sought to be appropriated by the voluntary assignment to the trustee for the benefit of other creditors. Ought this land to be taken as the vendee's and appropriated by his voluntary act to the payment of other debts before he has paid for it himself? The trust creditors have paid nothing for the land, have parted with nothing, hold their debts as before the conveyance; the trustee has paid nothing and is only a voluntary assignee, an agent of the vendee and creditors for sale of the land, technically clothed with the legal title and charged with the trusts of the deed, but nothing more. If the land shall sell for more than the debt secured, the vendee is entitled to the surplus. If the debts are discharged, either by the assignee paying them before closing the trust, or by a sale of part of the property, or in any other way, the property returns to the vendor or assignor without a reconveyance in our State. See 3 Head.

Some stress seems laid on the fact of acceptance

of the deed of trust as favoring the position of the beneficiaries. We cannot see the force of this. Acceptance of the benefits of the deed is but an assent to the assignment for his benefit. But the assent to a wrong or proposed wrong done to the rights of another, cannot sanctify the wrong nor raise an equity in favor of the party so assenting, superior to the right of the party being wronged. This must be the result in order to maintain the conclusion sought from the fact of acceptance. Under these circumstances, we confess we are unable to see the superior equity of the assignee and beneficiaries under such a deed. We think the simple question is, whether a vendee can by his voluntary act defeat the lien given by law to the vendor for his purchase money, and create or confer a higher right than he himself has on mere volunteers to the property assigned. We think all the analogies of law and the soundest principle forbid this being done.

While there may be some difficulties presented arising out of this view, yet not more nor so many as from the opposite, and we think it sustained by the large weight of authority and by the sounder reason. It is true there may possibly arise a case where a careless creditor may take a deed of trust to secure his debt and agree to delay, in consideration of the security, in ignorance of the existence of the lien for unpaid purchase money. But this need not be, if he uses common diligence, as the assumption is, that he is wronged by the existence of the vendor's deed registered, which shows no lien. He can easily enquire

of the vendor whether the land has been paid for. If he learns it has not, he has notice and cannot complain. If the vendor should mislead him by a false statement, he would be estopped to enforce his lien and the party be protected. We can see no great weight in such a possible injury as has been supposed.

I think there are incongruities unreconcilable with settled principles in the opposite view. A vendor has sold his land on a credit; the first note may not be due so as to file his bill "to locate" his equity; a creditor at large who has a note on the vendee asks it to be secured by a deed of trust. His note may not be due. He holds his note, does not give time or part with a single right under his contract; the land is conveyed to a trustee for his benefit. The vendor comes into a court of equity to enforce his lien for the purchase money; the holder of his note files his cross-bill to enforce the deed of trust and takes the land and the vendor goes unpaid. Is not this a case where a man should be required to do equity before he asks it? I think so. But a stronger case may be put. The other debt may have been the consideration money or balance of such consideration, due for a tract of land sold to the vendee. The party having this balance may have already enforced his lien or had a decree to sell, when the vendor in the other case makes his contract. He may sell and buy the land for half his debt. He can then, having an execution or right to one, coerce the vendee to convey the land by deed of trust, accept what he has thus

obtained, and thus, after having had his own lien enforced, fix his debt on the other land sold, and defeat the vendor's claim for payment. Surely this is not equitable or just. He is not an innocent purchaser, only a volunteer; but accepting the conveyance to a third party for his benefit, with no superior equity whatever, he gets a higher right than his debtor and assignor had, and by some influence not to my mind apparent, shakes off the equity of the vendor for the payment of his purchase money—an equity as old as the equity jurisprudence of England. He has parted with nothing for this advantage, paid not a cent, nor lost a single thing for which he bargained when his debt was created. His debt may well have been created before the purchase of the land by his debtor and therefore not on the faith of it. These, with many other difficulties, I am totally unable to reconcile.

Again, it has long been settled in this State, that the suspension or satisfaction of a precedent debt is not a sufficient consideration to give the endorsee of a bill or note the position of an innocent holder for value as against the equity of a third party enforceable against the endorser. The reason is, the endorsee parts with nothing, gives neither credit, money or goods for the note, sustains no loss or incurs any new liability. 1 Hum., 468; 2 Hum., 192. In the case of *Rhea* v. *Allison*, 3 Head, 180, the court say, the same principle is applicable to real estate, and add: "If any distinction as to this question could exist between the two species of property, we suppose it to be in favor of the purchaser of commercial paper; and so

we think the reasons would strongly preponderate in favor of the negotiability of such paper." So in the case of *Guinn et als.* v. *Locke*, 1 Head, 111, it was held that where land had been sold subject to the equity of redemption, and the party entitled to redeem had been prevented from redeeming by fraud and artifice of the purchaser, and this purchaser had conveyed the land to a third party in payment of a pre-existing debt, such purchaser was held bound by the equity because he was not "an innocent purchaser, but took the conveyance for a pre-existent debt."

These principles have long been known as the settled law of this State. Now to their application in this case. A creditor cannot take a conveyance of the title for pre-existent debt directly to himself, and get the land free from any equities that may exist against it. Yet he may, under the view maintained in the case under consideration, have the land conveyed to a trustee or third party, in order that it may be sold *to pay* his debt in the future, hold it freed from the equity and override the highest of all equities against it, the payment of the purchase money by the purchaser. In the one case the land is conveyed directly to him and he gives up his note against the debtor and assumes it paid, yet takes the land subject to the equity, because he parts with nothing; while in the other he still retains his note, has all his remedies on it, and yet by simple assent, either actual or implied, secures the payment of his debt by sale of the land, and may become the purchaser himself at that, thus by indirection securing what he could

not do directly. In other words, an unexecuted and incomplete appropriation of the land, a matter of contract *in fieri* as yet, is made stronger and more effective than a completed conveyance made directly to himself in payment and satisfaction of the debt. How these things can be, consistently, is what I am unable to see.

We might add, the difficulty is so well settled, that if a party purchase and pays his money with notice of the equity of the vendor, he takes subject to it; yet here he gets clear of it, by paying nothing, only by giving his assent to the wrong, either express or implied, regardless of notice. I am unable to assent to this view of the law.

We think the whole case on the other side rests on the proposition, that it is based on a nearer analogy to our registration laws in their spirit, than the view we have taken. That it is not within them, is settled by all the decisions of our courts; in fact, as we have said, if embraced by their lien, we would only have to look to the question of registration, and the priorities shown by this would be conclusive.

As to the vendor's lien being but an equity, so in fact is the beneficiary's rights under a deed of trust. He must go into a court of equity to enforce it as a trust for his benefit. The vendor's equity is prior in time, and I think stronger in right and justice.

We therefore conclude that the lien is a specific one fixed on the land, by the contract of sale; that the assignee in trust and beneficiaries are but volunteers, and as such stand in the shoes of the assignor;

that they must necessarily take subject to the lien, and can acquire by the voluntary assignment no higher rights in the land than the assignor had, but take it with all charges fixed on it at the time; that the case is not within the registry laws, nor are the parties protected as innocent purchasers.

Therefore, the trust not having been executed or sale made before the filing of the bill, the vendor's lien must prevail over the claim under the deed of trust.

Bowen v. The State.

1. The substantial averments of the indictment are: "The plaintiff in error represented himself to be a practicing physician; that he had restored sight to Ned Williams, a blind man; that he represented to the prosecutor his house and residence were infected with poison; that the poison was in the bed occupied by the grand-daughter of the prosecutor; that said grand-daughter was the person poisoned. He proposed to find the poison and remove it for a valuable consideration to be paid to him by the prosecutor; the prosecutor, relying upon these false and fraudulent representations and believing them to be true, paid to the plaintiff in error the sum of $22.00," etc., etc. *Held*, that the indictment is sufficient to sustain a conviction under section 701 of the Code, supported by the facts of this case.

   Code cited: section 4701.

2. Same. *Same.* *Same.* It is insisted that the false pretenses complained of are not such as would be credited by a person of ordinary caution. The court say: "We are aware that such language is used in some of the cases passed upon by this court. This restriction upon the

operation of the statute is not, in our opinion, authorized by its language. If ordinary caution is to have its influence in the application of the law, it must be such ordinary caution as we may naturally and reasonably expect to exist under the circumstances and conditions in life of the person practiced upon. The question is, What caution is he capable of exercising?

3. SAME. *Same. Legerdemain.* It is insisted there is no proof showing the falsity of the claimed superhuman power of the pretender, and therefore he cannot be convicted. The court say: "We reply, the negative is not susceptible of actual proof, but is of that class of things which bear to the intelligent mind the conviction clear and conclusive of its own falsehood"

4. SAME. *Same. Evidence.* It was error not to withdraw the prosecutor's evidence to the effect that one of the patients of the pretender had told him that he was not benefitted, when the prisoner had stated to the prosecutor that he had cured him, etc., as evidence of his skill.

FROM SHELBY.

Appeal from the Criminal Court. JOHN D. ADAMS, Judge.

B. M. BURROW for Bowen.

ATTORNEY-GENERAL HEISKELL for State.

TURNEY, J., delivered the opinion of the court.

The substantial averments of the indictment are: "The plaintiff in error represented himself to be a practicing physician; that he had restored sight to Ned Williams, a blind man; that he represented to the prosecutor his house and residence were infected with poison; that poison was in the bed occupied by the grand-daughter of the prosecutor; that said grand-daughter was the person poisoned. He proposed to find the poison and remove it for a valuable consid-

eration to be paid to him by the prosecutor; the prosecutor relying upon these false and fraudulent representations, and believing them to be true, paid to the plaintiff in error the sum of $22 00," etc., etc.

The proof is, the plaintiff in error went to the house of the prosecutor in company with a confederate and said he was a "Chickasaw Doctor," going about doing good; said "somebody seems to be sick here;" prosecutor replied, "yes, my grand-daughter;" plaintiff in error looked at her and said she was poisoned, that she had poison in her bed, etc., "but you do not believe it, you are hard to believe: I will show you how a person can poison another without coming near them." He took a hat and put it on a table, walked back to the back part of the room and told the prosecutor to raise the hat and see how many pieces of paper were under it; prosecutor raised the hat and there were none; plaintiff in error told him to put the hat down again, he did so, and was told to look, which he did, and found four pieces of paper under it. This was repeated, and the next time three pieces of paper were found. These things were done several times.

He then said there is poison about your house and I can find it, and told prosecutor to take up a brick ont of the hearth, which he did, and found a little ball mixed with hair. Plaintiff in error then went to the bed of the grand-daughter and asked for a pair of scissors, told the grand-daughter to cut a hole in the tick and feel amongst the feathers, she did so, and found a ball similar to the one found in the

hearth; the prisoner said this was the poison in her bed that was affecting her. He then said he was doing good among the colored people; that he had five hundred cases; that he had just been over to see old Ned Williams and had cured him of blindness; the prosecutor knew Ned Williams and knew he was blind. The confederate said, "yes, I was over there with him, and Ned Williams is all right." Prisoner said to prosecutor, "old man, you have enemies; you do not know the white people are better friends of yours than the colored people; your own people are your enemies; you have had bad luck, have you not?" Prosecutor said he had lost his wife and his hogs. Prisoner said, "yes, your wife was poisoned; that he could give me a thing that would tell me when my enemies were about, if I fed it and talked to it right;" prosecutor asked what he would charge; prisoner said ten dollars, which was given. Prisoner then took out a bottle filled with a white fluid; the bottle had a rag tied to one side of the neck, a small substance in the rag. Prisoner said this is a "Jack," he can talk, you will have to feed him out of the bottle. The way he talks is by knocking three knocks for yes, two for no; he asked "Jack" if prosecutor had enemies, Jack answered yes, etc. Prisoner told prosecutor he would have to cross the ten dollars with two for luck, this was done; prisoner said, "old man, feed Jack and talk to him right, and he will talk for you."

Prisoner's visits, representations and *legerdemain* were repeated until he had obtained $74.00.

The indictment is based on section 4701 of the Code, the act of 1829, in the words: "Every person who by any false pretense, or by any false token or counterfeit letter, with intent to defraud another, obtains from any person personal property, or the signature of any person to any written instrument, the false making of which is forgery, shall, on conviction, be imprisoned in the penitentiary not less than three or more than ten years."

The prisoner was convicted, sentenced, and has appealed to this court.

To the first objection, that the averments of false pretenses in the indictment are negatived thereby, we cannot agree. The indictment, under the old and technical rules of pleading in criminal causes, might be subject to criticism, but not so under the present practice in Tennessee.

It contains every element necessary to constitute the crime, distinctly notifies the defendant of the offense with which he is charged, and clearly negatives the truth of the assigned false pretenses, upon the credit of which the money was obtained.

It is insisted that the false pretenses complained of were not such as would be credited by a person of ordinary caution. We are aware that such language is used in some of the cases passed upon by this court. This restriction upon the operation of the statute is not, in our opinion, authorized by its language.

The object and purpose of the law is, to protect all *persons* alike, without regard to the single capacity to exercise ordinary caution, a condition of mind very

difficult of definition, and certainly of very different meaning under the various circumstances that may surround the person proposed to exercise it. Thus, a child entrusted with a watch, money or other valuable, to be borne to an artificer, merchant or friend, might be induced, by the most flimsy and self-apparent falsehoods, to part with it: still, if these representations were of a character to secure the credit of the child and deprive it of the possession of the goods, however absurd such representations might seem to the more mature and experienced, yet it would be such false pretenses by one person to another, as deprived that other of his personal property, as contemplated by the letter and spirit of the law.

A man of the country, unacquainted with the vices incident to a city, may be and often is cheated out of his effects by tricks and means that would not for a moment deceive him who was accustomed to the society in which such things so frequently occur, although he may have less strength of mind than the former.

If "ordinary caution" is to have its influence in the application of the law, it must be such ordinary caution as we may naturally and reasonably expect to exist under the circumstances and conditions of life of the person practiced upon. The question is, what caution is he capable of exercising?

The main object of the law is to protect the weak against the strong, the inexperienced and unsuspecting against the experienced and vicious.

There can be no rule of law caring more for the

protection of the wise and cultivated than for the foolish and unlettered. It is not required that one should exercise more caution and prudence than nature has given him. Here we have the negro who has but recently had conferred upon him the right of citizenship; every presumption is that he is ignorant, we know he is naturally superstitious, and it is apparent from the whole record and almost every part of it, that the prisoner had completely studied his nature and knew exactly at what points in his character and natural disposition to attack him. He represents himself as the peculiar and especial friend of the negro race, giving his whole time to the promotion of its welfare, health and happiness, and to prove to the satisfaction of his intended victim the truth of his professions of power, he resorts to sleight of hand performances and executes them with such adroitness as to elude detection of the trick by the artless negro, and would doubtless have eluded the most enlightened. These things impressed the prosecutor as miracles; he at once gave credit to the performer as inspired, and was in consequence victimized.

It is insisted there is no proof showing the falsity of the claimed superhuman power of the pretender, and therefore he cannot be convicted.

We reply, the negative is not susceptible of actual proof, but is of that class of things which bears to the intelligent mind the conviction clear and conclusive of its own falsehood. The false pretenses of power would not have deceived the strong or cultivated mind for the reason already given, but that they did

deceive an ignorant and superstitious negro is as certain as the simplest mathematical demonstration.

The negro was a "person" contemplated by the law; he exercised such ordinary caution as nature had endowed him with. He required proofs of the imposter as to his capacity to perform wonders, to the extent of drawing from him the complaint that he was hard to believe, and he only believed after frequent repetitions.

It is objected that the prosecutor stated that sometime after he was victimized he went to see Ned Williams, who told him he had not been restored to sight by the prisoner, etc., etc.

The failure to withdraw this statement from the jury was error, for which we are constrained to reverse.

The State v. William Brown.

Criminal Law. *Dog subject of larceny. Statute construed.* Under the statute of interpretation, sec. 51, Code of Tennessee a dog is personal property, and therefore, if of any value, is the subject of larceny.

FROM SHELBY.

Appeal from the Criminal Court. J. D. Adams, Judge.

Attorney-General Heiskell for the State.

B. M. Burrough for Brown.

Sneed, J., delivered the opinion of the court.

This case presents the question, whether, under the laws of this State, a dog is the subject of larceny.

At the May term, 1876, of the Criminal Court of Shelby county, the defendant was indicted for stealing a dog of the value of ten dollars, the property of the prosecutor, John E. Spicer. The court being of opinion that the dog is not the subject of larceny, on motion quashed the indictment, and the State appealed.

The learned judge, in thus ruling, has but reiterated the immemorial doctrine of the common law upon this subject, and such must be accepted as the law this day unless it has been abrogated by statute. The common law doctrine is thus given in the early books: "As to those animals which do not serve for

food, and which the law therefore holds to have no intrinsic value, as dogs and all other creatures kept for whim and pleasure, though a man may have a base property therein and maintain a civil action for the loss of them, yet they are not of such estimation as the offense of stealing them amounts to larceny." 4 Bl. Com., 190; Hale's P. C., 512; 1 Bish. Cr. L., sec. 787. Thus it was said "a man may have property in some things which are of so base a nature that no felony can be committed of them, as of a bloodhound or mastiff." 7 Coke, 18*a*; *Findlay* v. *Beer*, 8 S. & R., 571; 4 B., 236; 12 H., 8, 3; 18 H., 8, 2. The definition of larceny at common law and under our statute is the same, "the felonious taking and carrying away the personal goods of another." 4 Bl., sec. 230; Code Tenn., sec. 4677. The old doctrine of the common law was abrogated by the statute of 10 Geo. III., ch. 18, which made the stealing of dogs punishable. While the old doctrine prevailed the common law furnished the general examples of such goods, chattels or property as constituted the subject of larceny, and from this category the animal in question was excluded. It would seem difficult to give a sound reason for the old doctrine, in view of the concession that the dog is property, and of the indisputable fact that they are sometimes esteemed of great value. The words "goods and chattels" at common law include all personal property in possession, and if unrestrained in a will they will pass all personal property. 12 Coke, 1; Co. Litt., 118; 1 Atk., ch. 182; Williams. Ex'rs, 1014. Thus

it is said that "hounds, greyhounds, spaniels and the like are capable of being transmitted like other personal chattels, and as they may be valuable, and may serve for both profit and pleasure, they shall go to the executors and administrators. And why not, said Mr. Justice Doddridge, "for although hounds, greyhounds and spaniels be, for the most part, things of pleasure, that hindereth not but that they may be valuable." Went. Off. Ex., 143; 1 Williams. Ex'rs, 591. If it be the purpose of the criminal law to protect the property of the citizen in that which is useful and valuable, as well as to punish crime, we can scarcely characterize a doctrine as otherwise than simply arbitrary and without sound reason, which would exclude from the protection of the law an animal which, in its varied species, is possessed of so many elements of value and utility to the human family. But, as we have said, the doctrine of the ancient law on this subject is still the law here unless the statute has changed it. We have seen that larceny by our law is the felonious taking and carrying away the personal property of another. The terms "personal goods" and "personal property" are convertible, and in their general sense mean the same thing. The words "personal property," by our statute of interpretation, mean "goods and chattels." The dog is personal property, and if of any value is under our statute the subject of larceny. There is a conflict of ruling among the State courts on this subject. The Supreme Court of Alabama has decided that the dog is not the subject of larceny, but that court we

suppose had no statutory definition of "personal goods" or "personal property," and referred to the common law for the definition. "We think it safest," says the court, "to refer to the common law for the meaning of the words 'personal property' as used in the statute, and that law declares that dogs are not such personal property as is the subject of larceny." *Ward* v. *The State*, 48 Ala., 161; *Harrington* v. *Miles*, 11 Kan. Rep. In the case of *The People* v. *Campbell*, 4 Parkins N. Y. Cr. Rep., 386, it was held that "a dog, though property, was to enable the owner to maintain an action of tresspass for an unlawful taking was not the subject of larceny at the common law, but under the provisions of the statute declaring all personal property the subject of larceny, an indictment for stealing a dog may be sustained."

We need not go very far for a sound reason for this holding, and we think the solution of the question in this State also depends upon the statutory definition of "property" or "personal goods" as used in our criminal code, which makes the felonious taking and carrying away thereof larceny. A dog, if he have an owner, is personal property, and if of any value is the subject of larceny.

Reverse the judgment and remand the case for trial.

I dissent from the conclusion.

McFarland, J.

DICKSON, CLARK & CO. *v.* H. CULP *et al.*

ATTACHING CREDITOR OF FRAUDULENT VENDEE. *Not defeated by rights of Vendor. When.* Where a sale of goods is procured by fraud of the vendee, title passes, though it may be subject to the rights of the vendor to avoid the sale. But if a creditor of the vendee attach the goods before the vendor has taken any steps to avoid the sale, he cannot be deprived of the proceeds arising out of a sale under the attachment by the vendor.

FROM PERRY.

Appeal from the Chancery Court. G. H. NIXON, Chancellor.

J. M. PORTERFIELD for complainant.

JOHN A. PITTS for defendant.

McFARLAND, J., delivered the opinion of the court.

The argument for the complainants is earnest and plausible, but we are of opinion that the decree of the chancellor is right.

After the sale by the complainants to Watson, Culp caused the goods to be attached in an attachment proceeding instituted by him against Watson, and under orders which we must presume to have been proper, nothing else appearing, they were sold, to whom does not appear, but it does appear that they were not purchased by Culp. All this without any fraud or collusion upon the part of Culp, or any knowledge upon his part of the fraud of Watson in

the original purchase. After this the complainants file this bill, in which they charge that Watson procured them to sell him the goods by fraud, and it is insisted that they are entitled to the proceeds of the sale of the goods, which were still under the control of the court at the filing of the bill.

The facts as to the precise attitude of Culp's attachment proceeding are very imperfectly stated; in fact, nothing else appearing than as above stated. Admitting that the complainants have the right to avoid their sale to Watson, and recover the goods from him or from any one to whom he might have transferred them for a pre-existing debt, or that they might recover the proceeds of the goods from Watson or any one to whom the proceeds had been transferred without paying any new consideration therefor—that is for a pre-existing debt—still we think the complainants cannot recover. Culp's proceeding was rightfully instituted. The title to the goods when attached was in Watson. The sale was valid and passed the title, and the purchaser now holds them, as is not denied, at least no effort is made to recover the goods of the purchaser or purchasers. They are not made parties. This being so, it seems to me that it necessarily follows that the proceeds of the sale cannot now be taken from Culp, assuming that he is entitled to such proceeds as against Watson. His rights were fixed by the institution of his suit and the levy of his attachment, and must be adjudged upon the state of the case then existing. The complainants' contract with Watson was only avoided upon the filing of their bill.

This did not relate back so as to release or avoid the effects of the levy under Culp's attachment or the sale thereunder. In other words, to hold for the complainants would be to hold that Culp's proceeding was rightfully instituted, his attachment properly levied upon goods of his debtor, Watson, the sale regularly made passing the title, but that he shall not receive the fruits of his litigation; that the proceeds shall be given to the complainants, whose title to the property is conceded to be lost by virtue of Culp's proceeding, and yet Culp to be turned out of court to pay the costs and expenses of his litigation. It seems to us that if we hold that the proceeds of the sale of these goods may now be given to the complainants in disregard of the rights of Culp, that it would also follow that the complainants would be entitled to recover the money from Culp, even though it had been paid to him under the decrees of the court. His rights do not depend upon the date of the decree or judgment in his favor, but his rights are fixed by the institution of his suit and levy of his attachment. Of course it would be different if the property attached were taken by a superior title. Had Culp purchased these goods from Watson for a pre-existing debt, the complainants might have recovered the goods. This would have left Culp in no worse attitude than before, but now to take the proceeds from him would leave him to pay his costs and counsel fees.

Culp's rights depend not upon a purchase from Watson, but upon the effect of judicial proceeding rightfully instituted.

It has been held that where property has been transferred with intent to hinder and delay creditors, the creditors of the fraudulent vendee not participating in the fraud may, by first causing the property to be taken in execution against the fraudulent vendee, acquire superior rights to the creditors of the fraudulent vendor. The principle here is analagous to some extent, the difference being that here the complainants sold the goods to the debtor, but the complainants here, as well as the creditors of the fraudulent vendor in the case referred to, each seek to predicate their right upon avoiding a contract which, as to themselves, they had the right to avoid, but before they had done so the creditors of the debtor and fraudulent purchaser had seized the goods by execution or attachment.

Again, Watson held the title to the goods at the time they were attached, subject it may be to be defeated at the election of complainants, but until this election was made his title was clear. This was certainly a title which might be attached and sold; the purchaser would certainly get the title Watson had. If it be even conceded that the purchaser took this title subject to be defeated at the election of complainants, it was still good for the time and might never be defeated. The purchaser in this view would purchase at his own risk, and in this view the attaching creditor would clearly be entitled to the proceeds, and the complainants' rights, if any, would be to recover the goods and not the proceeds of their sale.

Decree affirmed with costs.

JOHN MCCALL *et al* v. JAS. P. CAWTHORN AND WIFE.

DEED OF TRUST. *Rights of beneficiary to attach rents of property conveyed to secure his debt where trustee has only legal title without possession. Denied.* A trustee holding the legal title to land, under a deed of trust, to secure creditors, but not in possession, has no right to the rents, nor can the same be attached by a secured creditor for the payment of his debt.

Case cited: Henshaw v. Wells, 9 Hum., 568.

FROM HENDERSON.

Appeal from the Chancery Court. G. H. NIXON, Chancellor.

TAYLOR & WOODS for complainants.

TOMLIN & TOMLIN for defendants.

DEADERICK, C. J., delivered the opinion of the court.

In October, 1872, this bill was filed, attaching rents of land conveyed by defendants, Cawthorn and wife, in trust to secure debts due to Carver, Beaver and others. One Cawthorne was by the deed appointed trustee. But the bill alleges that he failed to qualify, etc., and complainant McCall was duly appointed in in his stead upon petition of the creditors named in the deed, Carver and Beaver, the complainants, being two of the petitioning creditors whose debts were included in said trust deed.

The deed was executed in January, 1871, and con-

veyed two tracts of land and some personal property, and stipulates, if the makers should pay the debts enumerated and described by the first day of January, 1873, then said deed was to be void. But if the debts were not then paid, the said trustee was to sell on the premises said real and personal estate, etc.

The deed further stipulates that said Cawthorn, the grantor, retained the power to sell all or any part of said property, by the permission of the trustee, before the expiration of the trust.

Defendants McQuirter and Norfleet were in possession of the land, and the rents due from them were attached, the attachment issued upon the prayer of the bill but without any *fiat* of a judge. It was levied on growing and partly gathered crops of corn and cotton.

McCall in the bill seeks to subject the property attached to the payment of the debts secured in the trust deed *pro rata*, and if this cannot be done, then Carver and Beaver pray that it may be applied to their indebtedness.

Defendants demurred, and set out numerous causes of demurrer.

Upon the cause assigned, that defendant Cawthorn had until January 1, 1873, to pay the debts sued on, the chancellor sustained the demurrer and dismissed the bill as to complainant McCall, the trustee, but overruled all other causes, retaining the bill as to complainants Beaver and Carver, and both parties by leave appealed to this court.

The demurrer raises the question, whether com-

plainants had any right to file the bill to recover the rents of the land.

Upon the footing of the conveyance in trust of the land they had no right to the rents of the land, the trustee not having possession thereof.

The purpose of the deed to the trustee, as it recites, was to enable the trustee to sell at a specified time, January, 1873, if the debts were not paid; and the creditors having claimed the benefit of the provisions of said deed in their favor, assent to its provisions that the debtors shall have until the 1st of January, 1873, to pay the debts secured, but they acquired no rights to the rents.

The case cited in 9 Hum., 568, was a bill filed to foreclose a mortgage, and it was held in that case upon a bill filed for such purpose, that a receiver to collect the rents might be appointed, as all the parties in interest were before the court. But the doctrine that the mortgagee must recover the possession of the land before he can claim the rents was recognized as the rule law of governing other cases. *Id.*, 582–3.

In this case the bill does not seek a foreclosure, or claim the right of possession, but predicates the claim to the rents upon the conveyance of the legal title to the land for purposes of sale. The demurrer therefore should have been sustained.

The decree of the chancellor overruling the demurrer will be reversed, and the demurrer will be sustained and the bill dismissed.

The State v. L. B. Williams.

Bankruptcy. *Fraudulent conveyance. Judgment.* **A, having made a fraudulent conveyance of his real estate, was afterwards sued by B. During the pendency of the suit, A filed his petition in bankruptcy, and obtained his discharge before judgment was had against him. Afterward, B filed a bill to set aside the fraudulent conveyance, and to subject the property to the payment of the judgment against A: *Held*, that the discharge in bankruptcy was no bar to the proceeding.**

FROM HARDIN.

Appeal from the Chancery Court. G. H. Nixon, Chancellor.

Attorney-General Heiskell, Pitts & Cunningham for the State.

Inge & Inge for Williams.

McFarland, J., delivered the opinion of the court.

The State obtained judgment against T. W. Byrd and others on the 17th of May, 1773, in the Circuit Court of Hardin county, for upwards of $8,000, said Byrd and others being the sureties of E. J. McGee, revenue collector for the years 1866 and 1867 for said county, the judgment being for the balance of revenue due the State. An execution was issued on this judgment, and returned *nulla bona*.

The present bill was filed the 3d of March, 1876,

for the purpose, among other things, of setting aside a conveyance of certain lands alleged to have been made by said T. W. Byrd to his son-in-law, W. D. Read, on the 29th October, 1869, it being charged in the bill that said conveyance was made for the purpose of hindering and delaying creditors. In addition to the above allegations the bill further charges that the suit in which the State recovered the aforesaid judgment was commenced on the 29th day of June, 1870, and that said defendant Byrd appeared and pleaded to the action; while this action was pending, on the 22d December, 1871, said Byrd filed his petition in bankruptcy in the United States Court; on the 8th of January, 1872, he was adjudged a bankrupt, and on the 15th of April, thereafter, was duly discharged; that in his schedule of assets he reported no real estate, and nothing, in fact, but a few articles of personal property, which were allowed him as exemptions. The only liability reported of any consequence was the aforesaid liability to the State.

As before stated, after this discharge was obtained, on the 17th of May, 1873, the cause of the State was tried, and judgment rendered as before stated.

A demurrer filed by Byrd and Read was sustained, upon the ground that the chancery court had no jurisdiction to grant the relief prayed for, the facts stated in relation to the bankrupt proceedings forming an insuperable obstacle.

We think this precise question has not been decided by this court. We have several times held that the State courts have no jurisdiction to set aside a discharge

granted by the United States court in bankrupt proceedings upon the ground that the discharge was obtained by fraud. The court has also held that pending bankrupt proceedings a creditor cannot disregard such proceedings, and proceed in the State court to collect his debt by setting aside a fraudulent conveyance; that he must seek his remedy in the bankrupt court. *Alsabrook* v. *Cates et al.*, 5 Heisk.

In the case of *Hautrick et al.* v. *Bragg et al.*, MS., the complainants had a bill pending to reach certain properties of the debtors to satisfy their debt, and for this purpose to set aside a decree of court which it was alleged was obtained by fraud, and by which the title to the debtor's property was vested in his children. Pending this bill the debtor filed his petition in bankruptcy, the complainants appeared, proved their claim, and resisted the discharge upon the ground of this fraudulent disposition of the debtor's property, but the question was decided against them by the bankrupt court, and this court held that they were thereby concluded, and could not afterward successfully prosecute their cause in the State court.

This holding was manifestly inevitable, upon the ground that the question was *res adjudicata*, and because the complainants were no longer creditors, their debts being discharged by the bankrupt proceeding.

But in the present case it is manifest that the State has a valid judgment against the defendant Byrd which is not affected by the bankrupt proceedings, so far as the right is concerned to collect the same out of any property or rights the said defendant now has

or may acquire subject to execution or legal process, although the claim was in existence at the date of the bankrupt proceedings; yet, as the judgment is of a date more than a year subsequent to the defendant's discharge, we must take it that the defendant waived his discharge by failing to plead it, or that the court determined that the liability was one of that class not discharged by the bankrupt proceedings. The judgment is beyond doubt valid, and being founded upon a claim in existence at the commencement of the bankrupt proceedings, it must be held to stand upon the footing of a debt not dischargable in bankruptcy. How then can the complainant proceed to the collection of this judgment? Leaving out of view the bankrupt proceedings, and taking the bill as true, the case is clear, the conveyance being in fraud of complainant's claim then in existence.

Do the bankrupt proceedings form an insuperable obstacle? By the provisions of the bankrupt act the property and rights of the bankrupt pass to and vest in the assignee for the benefit of creditors, and this includes property previously conveyed in fraud of creditors; but this latter must mean only the right to sue for and recover property thus fraudulently conveyed. By such conveyance the title to the property passes to the fraudulent vendee where it remains until set aside at the suit of creditors, or the assignee suing for the benefit of creditors, so that the title to the property does not absolutely pass to the assignee until a suit is successfully prosecuted for the purpose of setting aside the conveyance.

The assignee, then, has the right to sue for and recover the property thus fraudulently conveyed for the benefit of all creditors who prove their claims. It is, perhaps, very clear that a creditor who has thus proved his debt, and who thus acquires a right to share in the distribution, must prosecute his right to reach the bankrupt's assets through the assignee. His right is to share with the other creditors in the distribution of the bankrupt's assets, and for this purpose it is the duty of the assignee to sue for and recover all property and assets in his reach; but beyond this a creditor standing in this attitude cannot go; his debt against the bankrupt is discharged, leaving him only the right to procure through the assignee his *pro rata* of all the assets. So that, a creditor standing in this attitude, when he attempts to disregard the bankrupt proceedings, and institute an independent proceeding, is met at once with objection that he has no claim upon which to proceed against the bankrupt; his debt is discharged, and he cannot, in this mode, withdraw assets from the jurisdiction of the bankrupt court and appropriate them exclusively to his own debt. But a creditor who has obtained a valid judgment subsequent to the bankrupt's discharge upon a pre-existing claim, does not stand in this attitude. He has a valid footing upon which to proceed against any property rightfully subject to his debt. He might have sought his share of the assets in bankruptcy, in which event he would have to seek his right through the assignee, but after having received his share he is not, like other creditors, at the end of his row; he still has a valid

judgment not discharged, and to have satisfaction of this judgment he may still proceed against property which by law is liable. Why shall he not proceed against the property conveyed in fraud of creditors? The answer is, that this property or right is given to the assignee for the benefit of those creditors who proved their claims and acquired a right to a distribution. But is this right given to the assignee exclusive of all others? We may concede that if the assignee assert his claim, that it would be superior to the right now asserted by complainant, but it is not exclusive. Suppose the assignee had sued for and recovered the property now in controversy, and out of proceeds paid all the debts proven, leaving a surplus—as according to the facts in the bill alleged would have been the result—might not the complainant have reached this surplus; if not, where would the surplus go? We think the complainant might reach it. How? Not through the assignee, for the claim was not proven in the bankrupt court, and no right of participation acquired.

But the assignee has not sued for and recovered the property, as often happens, not being willing to risk the costs of a suit. The claim was not prosecuted. Shall a creditor whose debt is not discharged, and who has a valid judgment, lose his right, which, as we have said, is an independent right?

The bankrupt cannot object to the recovery sought in the present bill. The judgment against him is valid. The property is gone from him in any event. How is it with the fraudulent vendee? How can he

complain? The facts conceded, the conveyance is void as to creditors, and the complainant is a creditor, but says the fraudulent vendee, the assignee in bankruptcy, has the better right to recover this property. Suppose he has, he has never asserted the right. But suppose he may yet do so, is this any objection to the complainants right to do so? In short, the complainant is a creditor, and upon the facts stated, this conveyance as to it is void. If the assignee should hereafter set up his claim, it might be only to recover the property, or its proceeds, from the complainant. The fraudulent vendee is in no danger of suffering two recoveries, as the property itself is the object of the litigation, and when once recovered from him, cannot be recovered again. The bankrupt proceedings being, at least for the present, at an end, it cannot be said that the property in controversy is in the custody or control of the bankrupt court. The court of one government cannot interfere with property in the actual control or jurisdiction of the other. Besides, we think, under the bankrupt act, the time in which the assignee may sue for this property has expired, but even if this be not so, the bill can be maintained.

The decree will be reversed, the demurrer overruled, and the cause remanded, the defendant paying the costs of this court.

Freeman, J., concurs upon the ground that the assignee's right to sue is barred by the bankrupt act.

JAMES M. FISHER v. WADE FISHER *et al.*

STATUTE OF LIMITATIONS. *Vendor's lien.* Where the legal title has passed to the vendee, and no lien was retained in the deed, the notes given for the purchase money may become barred by the statute. The implied lien of the vendor is then also extinguished.

Case cited: Lincoln v. Purcell, 2 Head, 143.

FROM DECATUR.

Appeal from the Chancery Court. G. H. NIXON, Chancellor.

A. & A. HAWKINS for Fisher's heirs.

JONES & CARTHEL and WALTERS for Wallace *et al.*

DEADERICK, J., delivered the opinion of the court.

The bill in this case was filed in the Chancery Court of Decatur county on the 27th of May, 1873, to enforce a vendor's lien.

On the 8th of March, 1862, complainant and W. L. Fisher sold and conveyed by deed a tract of land in said county to M. J. Fisher, for which the latter executed two notes of $500 each, due respectively in one and two years.

In the fall of 1862 or 1863, M. J. Fisher, the purchaser, died intestate, and defendants Wade and Wyatt administered on his estate in 1865. Afterward,

W. L. Fisher, one of the vendors, died, and complainant alleges that he administered upon his estate, and that all the purchase money in equity belongs to him.

The heirs at law, as well as the administrator of M. J. Fisher, are made defendants, and the bill prays that the land be sold, and that the proceeds of sale be applied to satisfy the two notes executed for purchase money, which are exhibited with the bill.

Defendants all answer, and rely upon the statute of limitations of two, six, and seven years as defenses to complainant's bill, and to any recovery upon said notes.

It is manifest that the statute of limitations of two years and six months are effectual bars against any recovery upon the notes. The deed, so far from retaining any lien, recites that the purchase money has been fully paid. If the purchase money has been paid, or the right to recover it by suit extinguished or defeated by the statute of limitations, where the legal title has passed to the vendee by an absolute conveyance, without any reservation of a lien, the implied lien between vendor and vendee for the payment of the purchase money will be also extinguished or defeated, for the vendor in such a case has lost his right to recover the purchase money, and cannot have an implied lien to secure that which he has no right to recover.

The sale by title bond, conditioned to make a deed upon the payment of the purchase money, reserves the legal title upon the face of the instrument, and stands

upon a different footing. So, also, the case of retaining the lien upon the face of the deed is in some respects similar to a mortgage, but different in this, that the "legal title passes by the conveyance, and vests in the purchaser, notwithstanding the reserved lien." But it is a specific lien, forming an original substantive change upon the estate conveyed. 2 Head, 143.

The chancellor held that complainant could not recover upon the notes, or have a lien declared upon the land for their payment, and dismissed the bill, and we are of opinion that his decree is correct, and we affirm it.

R. H. Epperson *v.* C. Van Pelt.

Replevin. *Property lost.* By statute, where the property attached is replevied, the bond represents the debt, and stands in lieu of the property, and judgment may be given on the bond for the value of the property, where it has been lost before trial.

Case cited: Bobo *v.* Patton, 6 Heis., 172.
Code cited: Secs. 3390, 3515.

FROM CROCKETT.

Appeal from the Circuit Court. G. B. Black, Judge.

POWELL & MCFARLAND for Epperson.

READ & READ for Van Pelt.

SNEED, J., delivered the opinion of the court.

The defendant, as a constable of Crockett county, levied an execution upon a buggy and harness as the property of Thomas Pearce, the execution debtor. The plaintiff claimed the property as trustee, and brought this action of replevin for its recovery. The proof was that the property belonged to Pearce at the time of the levy, and there was a verdict and judgment for the defendant, assessing his damages at the proven value of the property. It appeared in proof that after the property had been delivered to the plaintiff it was destroyed, whether by the plaintiff's fault or not does not appear. The judgment upon the verdict was that the plaintiff pay to defendant the value of the property as assessed.

There being no proof as to how the property was destroyed, the principle of the case *Bobo* v. *Patton*, 6 Heis., 172, has no application to this case. It was held in that case that when, in this form of action, the property replevied dies or is destroyed while in possession of the plaintiff, before the trial and without his fault, if the verdict should be for the defendant, the plaintiff is not liable for the value of the property. It is otherwise by statute. Where the property attached is replevied, as in that case, the bond represents the debt, and stands in lieu of the property; while in replevin cases the litigation is merely to try

the title to a specific chattel, and when the chattel ceases to exist by the loss of the property, without fault of the plaintiff, the litigation must end, as there is nothing to litigate about. Code, sec. 3515.

It being established by the proof that the property in controversy was destroyed before trial, the court declined to render the judgment prescribed by statute, allowing the discharge of the money judgment by the return of the property. Code, sec. 3390.

This is assigned as error. We certainly see no reason in such a case for the alternative judgment. It would be irrational to have pronounced such a judgment, the fact being undisputed that the property was destroyed, and could not, in the nature of things, be returned.

Affirm the judgment.

The Merchants of Memphis *v.* The City of Memphis and F. C. Schafer, Tax Collector.

Statement of Case: Brown & Co. obtained judgment against the City of Memphis in the Circuit Court of the United States of West Tennessee for paving, etc., which court ordered a peremptory mandamus, compelling the city council to pass an ordinance levying a special tax to pay said judgment. A levy of fifty-four cents on the one hundred dollars was made in obedience thereto, which was construed also to apply, by the Federal Court, to merchants' capital, a number of whom filed a pitition in the State Circuit Court at Memphis, praying for a *certiorari* and *supersedeas* to bring up and have superseded the distress warrants against each of them, in the hands of the city tax collector for the collection of the special tax assessed against them severally, which they aver to be illegal upon two grounds; first, because the ordinance itself is illegal, the city government having no power under the charter and laws to levy the tax; second, because the amount of the tax is too large, since the assessment of their capital for the year, which was made under the act of 1873, violates the Constitution, and assesses their capital above the proper amount.

1. Jurisdiction. *Of State and Federal Courts. Is exclusive and independent.* Where a State or Federal Court has rightful jurisdiction of parties and the subject matter, it must be allowed to proceed to judgment and execution; their jurisdiction being exclusive and independent, process issuing from the one cannot be enjoined by suit in the other.

2. Arguendo. *State court can take jurisdiction. When.* Cases might arise where the State Court could take jurisdiction, that is, if the city was proceeding to collect a tax from property exempt, or to collect double the amount assessed, the taxpayer, without denying the legality of the levy, might have his remedy in a State court to avoid paying that which under the levy he was not bound to pay.

3. Mandamus. *From Federal Court. Defence against by petition, with new parties. Must be made. Where. Not necessary for petitioners to have been parties to the original suit. Taxpayers are entitled to no notice, an ordinance levying a tax being legislative in character. The decision of a court ordering a mandamus has the effect of a judgment. When.* When a mandamus from the Federal Court orders a tax to be levied to satisfy its judgment, petitioners avoiding the payment of such tax have no re-

lief in the State courts, since the jurisdiction to correct the judgment, or protect parties from its effect, must either be in the court rendering the judgment, or one having the revisory power upon writ of error. The questions being the same, the State courts cannot take jurisdiction merely because the petitioners are new parties; it was not necessary that petitioners should have been parties to the original suit, since the act of adopting an ordinance levying a tax is not judicial, but legislative, in character, no notice to taxpayers is requisite to give it validity. The decision of the court ordering such a mandamus has the effect of a judgment, and leaves the defendant without discretion.

4. MANDAMUS. *Issues in nature of fieri facias. When.* If a mandamus issues to compel the levying and collection of a tax to satisfy a judgment of that court, it issues in the nature of an ordinary *fieri facias*, and is not an original proceeding, but simply a mode of executing the judgment of the court.

5. CONSTITUTION. *Construed. Merchants' tax.* The provision of the Constitution relied upon in this case is construed to mean simply that no merchants' tax, that is, the privilege tax upon merchants, shall be levied upon that part of their capital used in buying goods to sell to non-residents, but the property tax upon merchants shall be uniform with general property tax.

FROM SHELBY.

Appeal from the Circuit Court. C. W. HEISKELL, Judge.

S. P. WALKER and RANDOLPH, HAMMOND & JORDAN for the Merchants of Memphis.

J. B. HEISKELL, HUMES & POSTON, and WRIGHT & FOLKES for the City of Memphis.

MCFARLAND, J., delivered the opinion of the court.

This petition to Judge Heiskell was filed in the Circuit Court at Memphis by a number of persons,

merchants of the city. It prays for a *certiorari* and *supersedeas* to bring up and have superseded distress warrants against each of them in the hands of the city tax collector for the collection of a special tax assessed against them severally, which they aver to be illegal.

It may be stated, somewhat more in detail than is shown in the petition, that T. E. Brown & Co. recovered a judgment against the city of Memphis for about $292,000, in the Circuit Court of the United States for West Tennessee.

This recovery was upon a contract for paving streets of the city, the act of the Legislature authorizing the city to make the contract provided for, charging the cost of the paving upon the adjoining lot owners, in proportion to the frontage of the lots upon the streets. This was resisted by a portion of the lot owners, and the law in this respect declared by this court to be unconstitutional. The city having, however, guaranteed the payment to the contractor, the aforesaid judgment was obtained.

In 1873 the Legislature passed an act which it is claimed gave the city authorities the power to levy a tax to pay Brown & Co. and others the amounts due them. Afterward, in 1875, the act of 1873 was repealed.

In March, 1875, a writ of mandamus issued from the said circuit court against the city, which was afterward made peremptory, commanding the city council to levy a tax to pay a part of Brown & Co.'s judgment.

In obedience to this mandate an ordinance was

adopted on the 10th of December, 1875, levying a special tax of fifty-four cents on the one hundred dollars' worth of property to pay $125,000 of Brown's judgment, the mandamus directing that this amount only should be levied for the year 1875, a like amount for 1876, and the remainder for the next year following. This proportionment of the levy was agreed to by Brown & Co. It was ascertained that the city tax collector was omitting to collect this special tax from the merchants on their capital, and upon application a peremptory writ was again obtained from the court, commanding the city authorities to extend this levy of fifty-four cents on the one hundred dollars' worth to the capital of the merchants, and in obedience to this process the city authorities, on the 23d day of March, 1876, passed another ordinance, reciting the former ordinance, and also the fact that the city tax collector had been advised that it did not extend to merchants. The former ordinance was, therefore, declared to apply to merchants' capital, and said special tax of fifty-four cents on the one hundred dollars of merchants' capital for the year 1875, as previously assessed and returned, was thereby levied for the purpose of paying said judgment to J. E. Brown & Co., and the tax-collector was directed to proceed to collect and pay the same over.

This tax, the petitioners charge, is illegal, and levied without authority of law, and upon this ground they pray to have the distress warrants issued for the collection of said tax superseded. The petition sets forth a review of the various statutes constituting the charter

of the city and its amendments, embracing all the acts previous to the act of 1873, above referred to, and it is maintained that under these acts the city authorities could not levy for all purposes a greater tax than one dollar and sixty cents upon the one hundred dollars' worth of property in one year; that this sum had been levied and paid for in the year 1875, and the power under these acts, therefore, exhausted before the levy of the special tax in question; that the act of 1873 had been repealed before the special tax was levied, so that the levy of the special tax in question was entirely without authority of law.

The petitioner further avers, in substance, that the assessment for the year 1875 of the capital of the various petitioners was made under the assessment act of 1873, which fixes the rule as to merchants, requiring them to report at the end of the year the highest amount in value of goods, wares, and merchandize which such merchant had had on hand at any one time during the year, and he is taxed on this amount as his capital. The city changed the time of this report to the 1st of July.

It is further averred, that in addition to this tax upon their goods they were afterwards required to add the amount of money on deposit, and choses in action due them.

It is averred that this resulted in compelling them to pay double taxes on such parts of their goods as they had purchased on a credit, and the sums thus ascertained in reality far exceeded their capital, and that the law violates the Constitution requiring equality

of taxation; that the act also violates the last clause of the 28th section of article 2 of the Constitution, which forbids the levying of any greater tax upon that part of a merchant's capital used by him in the purchase of goods sold to non-residents than the *ad valorem* tax on property, it being averred that three-fourths of the capital of the respective petitioners was thus used.

Upon these grounds the petitioners ask that the distress warrants be perpetually superseded. The writs were temporarily granted, but upon motion and argument the petition was dismissed by the court, and the petitioners have appealed.

We have had the benefit of very elaborate and able arguments, and have endeavored to give the questions presented a careful consideration.

It will be observed that the petition puts the case upon two grounds, somewhat different in their character.

1st. That the ordinance levying this special tax is itself illegal, the city government having no power, under their charter and laws, to levy the tax.

2d. That if this be not so, the amount claimed against petitioners severally is too large, because the assessment of their capital for the year, which was made under the assessment act of 1873 (modified by the city ordinance) violates the Constitution, and assesses their capital above the proper amount.

The argument has been principally upon the first ground, and here the petitioners are met with the objection that as the ordinance of the city council levying the special tax complained of was passed in obedience to a peremptory mandamus issued by the Cir-

cuit Court of the United States for the satisfaction of a judgment rendered by the court, the State Court cannot interfere to supersede or stay the action of officers acting in obedience to this mandate; that to do so would necessarily result in conflict between the officers charged with execution of the process of the two courts.

It is admitted by the counsel for the petitioners that this question is one deserving very serious consideration. They earnestly maintain, however, that it is not fatal to their case. There are certain general principles applicable to the question which are well established, and, indeed, conceded, that is to say, that where a State or Federal Court has jurisdiction and control of the *res* or subject matter of the litigation, no process from the other court can be allowed to take such property out of the possession of the officers of the court first acquiring jurisdiction, or interfere with its action in regard thereto, and this without regard to whether the seizure was rightful or not, as in *Freeman* v. *Horne*, 24 Howard, where it was held that property seized by a marshal, under process from the Federal Court, as the property of one person, could not be replevied by a suit in the State Court by another claiming to be the true owner.

In *Buck* v. *Colbatt*, 3 Wall., it was held, however, that although the property could not be thus taken from the jurisdiction of the Federal Court, or its action in regard thereto interfered with, yet, if the process from the Federal Court commanded the marshal to seize the property of A generally, without specify-

ing any particular property, and the marshal wrongfully seized the property of B, that the latter might maintain trespass in the State Court against the marshal for the wrongful seizure.

Again, process from one court, either Federal or State, cannot be enjoined or otherwise controlled by suit in the other jurisdiction. Where the jurisdiction of the parties and subject matter is once rightfully obtained, the court so obtaining jurisdiction must be allowed to proceed without interference to judgment and execution. Its jurisdiction is necessarily exclusive, and independent of the other, and this, notwithstanding injunctions operate upon the parties and not upon the courts. This rule is uniform, and has been recognized in many cases. We refer, as more especially applicable, to the cases of *United States ex rel.* v. *The Council of Keokuk*, 6 Wall., where a mandamus was issued from a Federal Court commanding the City Council to levy and collect a tax to pay the relator's judgment. It was held to be no sufficient answer that the City Council had been previously enjoined at the suit of the taxpayers in the State Court from levying or collecting the tax; also *Riggs* v. *Johnson Co.*, 6 Wall.; also *Supervisors* v. *Durant*, 9 Wall.; *The Mayor* v. *Lord*, *Id.*

Again, it is settled that a mandamus, when so issued, to compel the levying and collecting a tax for the purpose of paying a judgment, is issued in the place of an ordinary *fieri facias*, and is simply a mode of executing the judgment of the court, and is not an original proceeding.

From these general rules it is argued for the defendants in this case that as it is conceded that the United States Circuit Court had rightful jurisdiction of the case of *T. E. Brown & Co.* v. *The City of Memphis*, that it had rightful jurisdiction to issue the mandamus to compel the city to levy and collect the tax to pay the judgment, and that as a consequence no State Court can rightfully interfere to declare void the ordinance passed by the city council in obedience to this mandate, or to prevent the city tax collector from doing what the Federal Court has commanded shall be done, that is, collect the tax.

But it is argued for the petitioners that in a case like this the Federal Court can only award the mandamus to compel the levying and collecting of a tax when it is a simple, plain, ministerial duty upon the part of the city council to do so, but when the power of the city council to levy such tax involves legislative or judicial discretion, to be determined under the general laws of the city, that the court cannot award mandamus, and so the judgment of the Federal Court in this case is void, and no defense to the city authorities who have obeyed it. The premises may be admitted, but the conclusion certainly does not follow. It being conceded that the Federal Court had jurisdiction in the case of *T. E. Brown & Co.* v. *The City of Memphis*, and that there being no other remedy, the court might award a mandamus to compel the city to levy and collect the tax, provided it appeared to the court to be a plain ministerial duty, it follows that we cannot undertake to say that its action was

void, because in our opinion it was not a mere ministerial duty upon the part of the city to levy the tax. This was a question for the Federal Court to decide. Having jurisdiction of the subject matter and parties, it must determine the facts and law upon which its action is based, and the extent of its jurisdiction and powers.

We must take it that it was determined by the court that it was the plain ministerial duty of the city to levy and collect the tax, and we have no jurisdiction to review this judgment. See the reasoning of Judge Dillon in the case of *Ex parte Holman*, 28 Iowa.

But again, it is argued that whatever be the effect of the mandamus proceeding as between Brown & Co. and the city authorities, that the merchants and taxpayers are not bound by this proceeding, as they were not parties thereto, and that the judgment and the ordinance levying the tax as to them is void; that when the city undertakes to enforce this tax against the taxpayers, that new rights and questions arise between them which the taxpayers have the right to litigate; that they must have their day in court; that the Federal Court might order the city authorities to levy and collect the tax; but whether under the law the city authorities had the power to levy such tax was a question between the city authorities and the taxpayers, to be litigated between them *de novo*.

The Federal Court, in awarding the peremptory mandamus, did not merely mean to say to the city, levy this tax, provided you have under your charter

the power to do so, but it necessarily decided, not only that the city had the power, but it was its plain duty to do so, otherwise no mandamus could have been awarded. This decision certainly had the effect of a judgment, and left the city no discretion. It was not necessary or proper that the taxpayers should have been parties. The act of adopting the ordinance levying the tax was not judicial but legislative in its character, and no notice to the taxpayers was necessary to give it validity as in judicial proceedings. It was a legislative act of taxation, so far as notice is concerned. It is true that when a tax is so levied without power or authority of law, the taxpayer may appeal to the courts to have it so declared, and its enforcement prevented. Of course, if this mandamus were out of the way, the jurisdiction of this court to enquire into the equality of this tax would be unquestionable, but for this court now to declare the tax illegal is necessarily an attempt to reverse the judgment of the Federal Court, and to supersede the distress warrants is necessarily to interfere with the process which the court has adopted to enforce its judgment.

It is said that the taxpayers are entitled to be heard, that they must have their day in court, that they cannot have a hearing in the Federal court because a proceeding in that court by them would be an original proceeding, and that court could not take jurisdiction of their case because the citizenship of the parties was not such as to give the court jurisdiction, and their only right to be heard is in the State Court

;

that the proper course was for the Federal Court to suspend the execution of its judgment until the tax-payers could institute the proper proceeding in the State Court, and that the Federal Court would then conform its judgment in accordance with the judgment of the State Court.

The case of *Dunn* v. *Clark*, 1 Peters, and *Christmas* v. *Russell*, 14 Wall., are relied upon to support this argument. These authorities hold, as do many others, that a bill in the equity side of the Federal Court, which is merely defensive to a judgment of that court, may be entertained without regard to citizenship. If it is an original bill, in which new parties and other matters are involved, the court cannot take jurisdiction unless the citizenship of the parties authorize it, but may suspend the execution of its judgment to give the parties the opportunity to litigate their new rights in the State Court.

The case of *Christmas* v. *Russell* may be taken as an illustration. Judgment had been rendered in the United States Court against a debtor in favor of certain parties upon one note, and another suit was pending upon a similar note, whereupon other parties came in by bill on the equity side, and alleged that they had the right to recover of the debtor the money due on these notes by virtue of a previous equitable assignment. The court held that this was a new and original suit, and as the citizenship did not authorize it, the court could not take jurisdiction, but left the parties to seek their rights in the State Courts; but as it was clear that both claimants were not entitled

to recover the money from the debtor, it was proper to suspend the execution of the judgment of the Federal Court until the rights of the new parties arising upon the new state of facts should be adjudged in the State courts.

It is claimed that this is a parellel case; that the taxpayers are new parties, and new questions arise between them and the city, and that the Federal Court should suspend its judgment until these new questions are decided in the State courts, the Federal Court not having jurisdiction on account of citizenship. The taxpayers are in one sense new parties, but the question they make is precisely the question which arose between Brown & Co. and the city, and which was decided. True, they were not parties, but it was the duty and interest of the city to make for them all the defense that could be made as to the want of power, and when the taxpayers presented themselves in the Federal Court, as it appears from a report of the proceedings they did, they presented themselves standing in precisely the attitude of the city, not presenting a new right, but simply denying the correctness of the judgment awarding the peremptory mandamus. They might present new facts and considerations to the court, but the question was the same. The judgment they asked the court to render in their favor was to set aside, reverse, or suspend the judgment rendered. This, we think, was a defensive and not an original proceeding, and that the jurisdiction to correct the judgment complained of, or to protect the petitioners from the effect thereof, must be either in the

court that rendered the judgment, or in the court possessing revisory power upon writ of error.

We understand from the report of the proceedings that relief was asked by the taxpayers in the form of a bill on the equity side of the court, or upon petition, and the court denied the relief, but not for want of jurisdiction, and the entire proceedings are to be reviewed in the Supreme Courts upon writ of error prosecuted by the city, whether by the taxpayers also or not we are not certainly informed; but the question as to the correctness of the judgment awarding the mandamus will certainly arise upon the writ of error of the city, whether the taxpayers be technical parties or not, but we doubt not that they also will have a fair hearing. At any rate, we think we cannot take cognizance of the case merely upon the ground that the application is made by the taxpayers, and that they are new parties. It seems to us manifest that we cannot render the judgment prayed for without necessarily producing a conflict between the officers commanded to execute the process of the Federal Court and our officers. The Federal Court has commanded this tax to be levied and collected, and paid over. How can we supersede its process? It has been, in fact, virtually conceded in argument that we cannot rightfully render or attempt to enforce such judgment; but it is said that if this court will express an opinion as to the power of the city to levy this tax, that the Federal Court will adopt our judgment because they universally adopt the construction given by a State court to its statutes. It is a rule that the Federal

Court will adopt the construction given by a State court to the statutes, to be found in previous adjudications of the State court, but it is unquestionably the province of the Federal Court to determine the construction of any statute of a State when the question arises in any case of which they have jurisdiction, and if no previous adjudication has been made on the question by the State Court, the Federal Court decides for itself, and it would be hardly proper for this court to express an opinion merely as advisory to the United States Supreme Court, in a case now pending in that court, in a case where we cannot take jurisdiction to pronounce any judgment.

Although the construction of the statutes of this State is peculiarly the province of our courts, yet this must be in cases where we have rightful jurisdiction, and it would not be respectful to assume that the Supreme Court cannot properly or correctly decide questions of this character without our instructions, and that court would certainly not be bound to follow our opinion should we thus express it in a case not properly before us.

It has been said that the Judge of the Federal Court expressed a desire that the opinion of this court should be had upon the question. We see nothing of this sort in his opinion, or the proceedings had before him, if, indeed, this could have any effect. We hold, therefore, that we cannot take jurisdiction to supersede the distress warrants complained of upon the ground that the city authorities exceeded their power in levying the tax, because the tax was levied in

obedience to a mandate of the Federal Court commanding the tax to be levied, issued in a case where the court had jurisdiction of the parties and subject matter, and having no rightful jurisdiction, we decline to express any opinion as to the legality of the tax.

It is possible, however, that cases might arise where the State courts could take jurisdiction, that is, if the city were proceeding to collect a tax from property exempt, or to collect double the amount assessed. The taxpayer, without denying the legality of the levy, or attempting to avoid its effect, might have his remedy in a State court to avoid paying that which under the levy he was not bound to pay.

One ground taken in the petition amounts in substance to this, that the assessments of their capital for the year 1875 were too high, that they are each being required to pay upon a larger capital than they should be. This we think, in any view, is not a ground to supersede the distress warrants in this case. Petitioners do not appear to have complained of these assessments, on the contrary, they paid the general levy upon this assessment without complaint. If the assessments were wrong the statutes, we think, provide a mode for correction or redress. Besides, we think there is nothing in the question made. The provision of the Constitution relied upon means simply that no merchants' tax, that is, the privilege tax upon merchants, shall be levied upon that part of their capital used in buying goods to sell to non-residents, but the property tax upon merchants shall be uniform with the general property tax.

If the act, as is contended, really requires merchants to pay tax upon goods not paid for, and also money and choses in action, this is no more than is required of others. In many instances persons are required to pay taxes on land on which they have not paid the purchase money, and the persons to whom they owe the purchase money are also required to pay taxes upon the debts thus due them, in reality paying twice on the same property, and other similar instances of practical inequality might be cited.

The judgment of the circuit court dismissing the petition is affirmed.

JACKSON, ... APRIL TERM, 1877.

MERRIMAN, Adm'r, *v.* JOHN CANNOVAN *et al.*

1. GARNISHMENT BILL. *Guardian and ward. Married Women. Bills and notes.* A garnishee may set-off against a debt due by him, notes taken by his guardian, a *feme covert*, payable to her, as guardian, for moneys belonging to him, they having come to his possession upon majority.

2. SAME. *Same. Statute of limitations.* When the statute operates on the remedy it must be pleaded. An *ore tenus* defense is not admissible; if the notes were barred by the statute which it was not pleaded, the set-off will be allowed.

Case cited: Owen's heirs v. Stubblefield, 10 Yer., 119.

3. SAME. *Same. Trusts.* When a party borrows money from a trustee, without security, it is a breach of the trust, of which he has notice, and thereby becomes a quasi trustee himself, and is estopped from pleading the statute of limitations against the recovery of such a debt.

Case cited: Moffitt v. McDonald, 11 Hum., 457.

FROM SHELBY.

Appeal from the Chancery Court. R. J. MORGAN, Chancellor.

S. P. WALKER for Merriman.

C. W. METCALF for Cannovan.

L. D. MCKISSICK for Cooke.

SNEED, J., delivered the opinion of the court.

The complainant, as administrator, recovered a judg-

ment at law against the defendant Cannovan, for $4,365.65, upon which an execution was issued and returned *nulla bona*. He thereupon filed this bill for the purpose, among others, of subjecting the indebtedness of defendant, Thomas H. Cocke, to Cannovan to the satisfaction of the said judgment. The defendant Cocke is regularly made a party defendant to the bill, his indebtedness to Cannovan is attached, and he is called upon to discover his said indebtedness. His answer discloses an indebtedness to Cannovan by open account in the sum of about seventeen hundred dollars; but he discovers also an indebtedness on the part of Cannovan to himself in two notes of $1,000 each, executed by Cannovan to the guardian of said respondent, and demands that the same be set-off against his said indebtedness to Cannovan. The original bill in the cause was filed on the 24th October, 1866. The notes upon which the respondent's demand of set-off is predicated, were executed to Mrs. Isabella M. Houston, a *feme covert*, the grandmother and with her husband guardian of the respondent, and as the proof abundantly shows, were given for borrowed money of the trust fund in her hands which she loaned to Cannovan, who had full notice that the moneys so borrowed by him, were of the said trust fund and the property of the respondent. The said Isabella M. Houston became discovert by the death of her husband in 1863, and upon the respondent's attaining his majority in 1866, the notes were turned over to him by her as his property. These notes were not under seal, and were dated respectively the first of January,

1855 and the first of January, 1858, the first falling due the first of January, 1858, and the second the first of January, 1859. The answer of the respondent Cooke was filed 11th June, 1867. Afterwards the complainant filed an amended bill, and the defendant Connovan a supplemental answer, and neither party resorted to the statute of limitation as a defense against the notes; nor is the statute invoked in any other form of written pleading. It is stated here in argument that the statute was relied on in argument below by oral plea. The chancellor gave the complainant a decree against the respondent Cooke for the amount of his indebtedness to Cannovan, but refused to allow the set-off upon the ground that the notes were barred by the statute of limitations. The respondent Cooke has appealed, and the only question now before us is, as to the application of the statute of limitations under the facts of the case. We are constrained to differ with the Chancellor as to his conclusion in this case. In the view we have taken of the case it is not necessary to consider the argument submitted as to the operation of the statute of limitations upon the notes while in the hands of the payee, Mrs. Houston, and before they were delivered to their real owner, the respondent.

A very plausible if not conclusive argument against the operation of the statute might be predicated upon the doctrine of the law applicable to the relation of husband and wife, upon the peculiar state of facts under which these notes were held by the payee, Mrs. Houston, before and after she became discovert. If

that theory be the true one, then the notes even in the hands of Mrs. Houston would not have been barred at the time the respondent's right accrued. And many respectable authorities may be cited in support of this view, which we do not, however, propose to elaborate, as another question must be decisive of the case. Upon this question, without resting this adjudication upon it, we content ourselves with a reference to some of the authorities; 4 Dana R., 333; 9 B. Mon., 365; 2 Mauls & Selm, 396; 5 Wheat., 138; 3 Stewart, 375; 12 Ves., 497; 17 Ark., 154; 10 Ala., 682; 6 Mees & Wels., 423; 10 Bosw., 314; 1 Rawl Rep., 455; Borst *v.* Spelman, 4 N. Y. Rep., 284; 16 Mass., 483.

In one of these cases, it is said that where an obligation or contract is taken to the husband and wife, or to the wife alone, with the assent of the husband, the action survives to the wife, who is entitled to the proceeds as against the heirs and representatives of the husband. In such a case the form of the security implies a design by the husband to benefit the wife, and the law will give effect to this intention when the interest of creditors is not affected. Indeed, an agreement with a *feme covert* and a promise to her personally, raises the presumption that she is the meritorious cause of such agreement, and it will survive to her. This is held to be the rule at law as well as in equity. Borst *v.* Spelman, 4 N. Y. Rep., 284; Tyler Inf. and Cov., 384. But we do not care to pursue this doctrine as applicable to this case under

the hypothesis that the notes in controversy indicate a conversion of the trust fund.

Nor is it necessary to discuss the question whether the statute of limitations could be available in this case at all, without being in some manner invoked in the written pleading. It has been regarded, however, at least since the case of *Maury* v. *Lewis*, 10 Yer., 119, as the law, that in a case like this, where the statute operates on the remedy only, it must be pleaded or the party cannot avail himself of it. The answer, says the court in that case, does not rely upon the statute of limitations, and therefore the defendant cannot now insist upon it. The case of *Kegler* v. *Miles*, Mart. & Yer., has no application here. This is not a suit for specific property, the possession of which confers a title. In a case like this the statute operates only on the remedy; and in such a case, says Judge Green, according to all the books, it must be pleaded. The case of *Owen's heirs* v. *Stubblefield*, decided at Sparta in 1833, was like this. The court there held that the parties could not have the benefit of the statute of limitations because they had not relied upon it in their answers. 10 Yer., 119.

But apart from all these considerations, there are strong equities growing out of the peculiar facts of this case, which in a court of conscience should brand this irregular and anomalous *ore tenus* defense of the statute of limitations as one not to be favored, if they do not indeed operate as an effectual estoppel, in the view of a court of equity. It appears that the account of Cannovan against Cocke, sought to be subjected to the

complainant's debt, was for moneys and merchandize furnished the respondent Cocke by Cannovan, when the former was a minor—to many of which items the minority of the respondent would have interposed a valid defense, not being for necessaries, and that respondent, after his majority, affirmed and ratified the voidable contract upon the express condition that these notes were to be taken into the settlement. The defendant Cannovan expressly acknowledged that he owed the notes and promised to pay them and to bring them into the settlement. There seems to be some doubt upon the proof whether he did not annex the further condition that his claim for improvements upon certain leased property of the respondent was also to be brought into the settlement; but it is sufficient for our purpose, in illustrating the equities of the parties, to know that it is abundantly shown that the respondent would not have ratified the voidable contract upon which he is now sued, but for the express understanding that upon a settlement these notes were to be recognized as valid and subsisting debts due to the respondent from the defendant Cannovan.

The proof is in conflict as to the precise character of Connovan's recognition of the notes; some of the testimony showing that it was conditional upon a settlement of all matters between the parties; and other portions of it to the effect that he admitted the justice of the notes, and promised absolutely and without condition to pay them; only stating that he could not pay them then for want of money. While in this state of the proof, therefore, we do not undertake to

adjudge that the promise was of that character which would revive the debt if barred, yet we cannot, under such a state of facts, "strain the timbers of the law" so far as to favor an *ore tenus* defense of this kind, however much we might be disposed in a proper case, to relax the stern rules of pleading upon this subject.

But we rest our decision of the cause upon another question. We have seen that these notes were given for the loan of the trust funds of the respondent in the hands of his guardians; and it appears beyond all controversy that the defendant Cannovan was well advised of this fact. Under such circumstances a court of equity will not tolerate the statute of limitations as a defense against the recovery of the money. It is matter of public statutory law, which the defendant Cannovan was bound to know, that the lending of trust moneys upon no security at all as in this case, was a breach of the trust. And by borrowing this respondent's money with a full knowledge of the fact that no security was required or given, the defendant Cannovan, upon well-established principles, made himself a *quasi* trustee and subject to all the burthens and liabilities of that relation. Thus, it is said, if a trustee loans the trust fund in breach of the trust, and the borrower has notice of the trust and the breach, he becomes a *quasi* trustee, and he cannot separate the loan from the trust, nor insist that the statute of limitations, which bars a loan as a loan, also bars the remedy for the trust fund in his hands. Perry on Trusts, § 832. The *cestui que trust* may follow the fund into any new investment in which it may be

clearly identified. *Id.*, 836. And if it be followed into the hands of one who receives it by collusion, *or* with express notice of the trust, he cannot plead the statute of limitations, for the reason, that he becomes himself a trustee. *Id.*, §§ 840, 859; *Earnest* v. *Croysdill*, 6 Jur., 740; *Rolfe* v. *Gregory*, 11 Jur., 97; 3 How., 333; 11 Hum., 457; 3 Ned. Eq., 569; 7 Allen, 499. We think these principles are sound and have no hesitation in applying them here as decisive of the equities of these parties upon the case presented.

The result is, that the Chancellor's decree must be modified so as to give the respondent the benefit of his set-off.

Judge FREEMAN does not concur in this opinion, so far as it precludes the plea of the statute of limitations on the ground of the trust relation of Cannovan to the fund in controversy; but is inclined to the opinion that he would be precluded from relying on the statute upon other grounds.

GEORGE B. MILLER *et al.* v. ALLEN HARRIS *et al.*

1. CHANCERY PRACTICE. *Multifariousness. What is.* A bill is multifarious when several matters of a distinct nature are complained of against divers defendants, or a bill that unites against a single defendant several distinct matters; the court must look to the circumstances of each case to avoid multiplicity of suits on the one hand, and inconvenience to defendant and confusion of evidence on the other.

2. PARTNERSHIP. *Statute of six years does not run against partner. When.* No right of action for an account accrues to a retiring partner that can be "effectually prosecuted," until the liquidating partners, having possession of the assets, have settled the debts of the partnership; the statute of six years, in such case, does not run against the retiring partner.

FROM DYER.

Appeal from the Chancery Court. JOHN SOMERS, Chancellor.

LATTA & MARSHALL for complainants.

RICHARDSON, ANDREWS & WATKINS for defendants.

SNEED, J., delivered the opinion of the court.

The Chancellor's decree, disallowing the demurrer to the amended bill, was correct, and must be affirmed.

1. The bill is not multifarious. A bill is multifarious when several matters of a distinct and independent nature are complained of against divers defendants, or where one bill unites against a single defendant several matters perfectly distinct and unconnected. The latter is more properly called misjoinder.

On a question of multifariousness, the court must look to the circumstances of each case, to avoid on the one hand multiplicity of suits, and on the other, inconvenience and hardship to defendants, in being called upon to defend as to matters that have no connection, and to avoid complication and confusion of evidence. Story Eq. Pl., §§ 274, 530; 2 Gray, 471; 3 Stor. C. C., 25. The bill seeks a settlement of several commercial partnerships, of which the complainants and defendants were members, the whole of which may be well settled under one litigation, rather than by a multiplicity of suits. It is certainly to the interest of all parties that one litigation should settle the whole matter, and the interests and business of the several firms would in such a case be so intermixed and blended, that they could not be so satisfactorily settled in several suits, as in a single litigation.

2. The remedy of the complainant, George B. Miller, was not barred by the lapse of six years from the date of his retirement to the time of the filing the bill. He was for many purposes still a partner, and as the assets of the firm became, on his retirement, a trust fund for the payment of partnership debts, his right of action for an account did not accrue until after the firm debts were discharged. The bill shows that the firms were largely in debt. The retiring partner was, as to the assets of the firm, a tenant in common with the remaining members of the firm—and equity would fix upon them a relation of trust in favor of the retiring party, which would under such a defense, to say the least of it, be no favorite with a

court of equity. It is sufficient to say, however, that no right of action for an account accrued to the retiring partner that could be "effectually prosecuted," until the liquidating partners, having possession of the assets, had settled the debts of the partnership. Story Part., § 326; Chitty Cont., 288; 3 Kent Comm., 57; 17 Pick., 519.

Affirm the decree and remand the cause.

JOHN M. LEA *et al. v.* THE CITY OF MEMPHIS.

96 103
116 647

1. MUNICIPAL CORPORATION. *Tax paid by reason of threats of litigation, etc. Not recoverable. When.* A tax paid by reason of threats of litigation or the apprehension of the levy of distress warrants, cannot on this ground be recovered, although the levy and tax was illegal, there being no fraud or mistake of facts, but only mistake as to legal liability. A State or city may and ought to refund a tax so paid.

2. SAME. *A City is contracting party, and not agent. When.* In a matter of taxation the city is contracting party and not the agent of the tax payers.

3. SAME. *Certificates of indebtedness. Issued by city. Valid. When.* A certificate of indebtedness issued by a city, upon its own ordinance, to individuals, who have paid illegal assessments, are valid and binding obligations against the city, and founded upon a valid consideration.

4. SAME. *Same. Issued by the city of Memphis receivable for taxes. When.* The certificates of indebtedness issued by the city of Memphis in 1873, were receivable for taxes on account of "Nicholson pavement" for the years 1873–74–75, from those who had paid the original assess-

ment to Brown, but while this was so, a State court would not interfere with the special "mandamus tax" levied under the mandate of the U. S. Court, as this would be in effect to defeat the execution of the order of said court.

FROM SHELBY.

Appeal from the Chancery Court. R. J. MORGAN, Chancellor.

ESTES & ELLIOTT, HARRIS, MCKISSICK & TURLEY, and L. P. MCFARLAND for complainants.

S. P. WALKER for defendant.

DEADERICK, C. J., delivered the opinion of the Court.

By an act of the Legislature, passed in 1866, the City of Memphis was empowered to contract for the paving of the streets and alleys of the city with Nicholson and stone pavements, and to assess the costs thereof upon the property abutting thereon. Under the authority of this act the city ordained, in 1867, that such of its streets and alleys as the Mayor and Aldermen might designate, should be paved and the costs assessed upon the property fronting thereon. The ordinance prescribes the manner in which the city may contract for the work and how the assessments are to be collected off the property owners.

A contract was made with T. E. Brown & Co. to lay down Nicholson and stone pavements upon several of the streets of the city, and as the work progressed bills were made out, certified to be correct by the City Engineer and delivered to the contractors, and

were by them presented for payment to the owners of the property in front of which such work was done.

Complainants, as they allege, paid large sums upon such assessments to avoid litigation and sale of their property—the assessments having been declared by the act and ordinances liens upon the property assessed. Many of the citizens resisted the assessment; litigation ensued, and at April term, 1872, of this court, in the case of *Brown* v. *Hart*, it was held that such assessments were illegal, and that the act of the Legislature and ordinances of the city authorizing the same, were unconstitutional and void. Then follows the act of the Legislature of March 24, 1873, empowering the City of Memphis to levy a tax, in addition to other taxes, sufficient to pay the entire costs of the pavements, and to allow those who had paid their assessments credits for the same in the payment of said taxes.

The city thereupon passed an ordinance in 1873, authorizing the Mayor to issue certificates of indebtedness to those who had made payments upon said assessments for the Nicholson and stone pavements. This ordinance made such certificates receivable at their face value and interest in payment of any tax thereafter levied by the city to cover the costs of said Nicholson and stone pavements.

The form of the certificate is prescribed in the ordinance. It is, that "The City of Memphis is indebted to ——— or order in the sum of ——— to bear interest at the rate of six per centum per annum, from the —— day of ——— until this certificate is redeemed." It is further stipulated that this certificate

is receivable only in payment of any tax that may be levied by the City of Memphis to cover the entire cost of laying said pavements.

In the meantime, Brown & Co. had brought suit in the U. S. Circuit Court at Memphis, against the city upon their contract and recovered. Upon appeal to the U. S. Supreme Court the decree was modified; but it was held that the work was done under a contract with and by the employment of the city, and that it was liable to the contractors upon that contract. 20 Wal., 311; and the same having been remanded to U. S. Circuit Court, a *mandamus* was issued compelling the city to levy a tax to pay the amount of the decree.

The city, it is alleged, thereupon levied a tax of seventy cents on the $100, under the *mandamus* to pay Brown & Co., and also a tax of same amount to reimburse those who had paid to the contractors under the void assessment. This latter tax was payable in the city certificates of indebtedness issued to those who had paid the illegal assessments. The former, or "*mandamus* tax," to pay Brown's decree, was payable only in cash, and complainants and all others were bound by the ordinance to pay it in cash. These taxes were imposed for the year 1873, and an additional "*mandamus* tax" of thirty cents on the $100 worth of property was levied for the year 1874; thus for those two years, according to the terms of the ordinance levying the "*mandamus* tax," a large additional tax payable in cash was imposed upon complainants, notwithstading they held the evidence of the city indebt-

edness to them in an amount greatly exceeding the amounts of their taxes of both kinds; and this indebtedness having arisen from payments made by them in the extinguishment *pro tanto* of the debt of the city to Brown & Co., for the payment of the balance of which the "*mandamus*" was imposed. The tax collector, it is alleged, refused to receive the certificates of indebtedness which were tendered in payment of the "*mandamus* tax."

The bill further alleges that the city is insolvent, and that the power to levy the reimbursing tax has been repealed by the act of 1875, and that said city is about to lay additional "*mandamus* tax" upon complainants. The bill prays that the city be enjoined from further claim for paving tax off complainants, until the other tax payers have paid their proportion of the same.

The city demurred to the bill; the demurrer was overruled, and the city has appealed to this court.

It is here insisted for the city that the complainants, upon the facts stated, cannot maintain an action against the city to recover the assessments paid by them, and are not entitled to any relief; that although the city was the contracting party for the tax payers, the latter had voluntarily paid the assessments and had thereby ratified and adopted the acts of the city performed by it as the agent of the parties assessed; that taxes illegally assessed and collected, cannot be recovered back, there being no fraud or mistake of fact, although the payor is mistaken as to his legal liability.

Mr. Cooley, in his recent work on taxation, at page 566, says: "That a tax voluntarily paid cannot be recovered back, has been held by the authorities, with very few exceptions. It is immaterial in such a case that the tax has been illegally laid or even that the law under which it was laid was unconstitutional." And he cites numerous adjudicated cases to support the doctrine announced in the text. The rule is laid down to the same effect in Dillon on Mun. Corp., section 751, and notes.

And while it is true that threats, or litigation, or apprehension of the levy of distress warrants on property by the weight of authority would not make a payment of taxes under such threats or apprehensions compulsory, yet where taxes have been wrongfully exacted by the State or by a city, they may and ought to be refunded.

It is very ingeniously argued for the city, that in the contract for the paving the city contracted as agent of the tax payers, and that by the terms of the contract the parties assessed were primarily liable to the contractors and the city merely the guarantor for their performance.

This construction of the contract, though plausible as to some of its expressions, is inconsistent with its obvious purposes and meaning. As held in 20 Wallace, the city was in fact the contracting party, and stipulated in the contract to have the tax payers pay directly to the contractors, thus providing for making the payments without the employment of other agencies. But the fund to be provided for the payments was to

be raised by the assessments upon the property holders by the direct exercise of the taxing power of the city. The city in fact made the contract for the work and levied the taxes for the payment, and provided simple and effective agencies for its collection.

The tax having been wrongfully and illegally imposed, collected and applied to the benefit of the city in the discharge of its indebtedness, it was right and lawful for the city to provide for the indemnity of those from whom it had been wrongfully and illegally exacted. Cool. on Tax., 530.

This was done by the ordinance already referred to, pursuant to the act of March 24, 1873, by which the Mayor was authorized and required to issue certificates of indebtedness to all persons who had paid the illegal assessments, for the amount thereof, thus not only acknowledging their liability to repay the amounts so illegally exacted, but foreshadowing a mode afterwards adopted, by which the same were to be paid.

The city thus became bound by its solemn and deliberate recognition of this indebtedness and promise to pay it. And the recognition and promise enure to the benefit, not only of those who procured certificates of indebtedness, but equally to all others who paid the assessments; the money having been paid for the benefit of the city, constitutes a debt upon it.

In the case of *Nelson* v. *The Town of Millford*, an illegal tax had been levied and collected by the assessors, and they, to prevent actions against them by persons whose property had been distrained, refunded the tax so collected, and the town authorities directed

that the sums paid back by the assessors should be refunded; subsequently this order to pay the assessors was rescinded. But it was held that the vote to refund to the assessors the amounts refunded by them to the tax payers, was a promise founded upon a valid consideration and could not be rescinded by a subsequent vote. 7 Pickering, 18.

While, therefore, we are of opinion that the taxes of 1873 and 1874, which were levied to reimburse those who had paid the pavement assessments, may be paid by the city's certificates and by its indebtedness for such payments, we cannot interfere with the special *mandamus* tax levied under the mandate of the U. S. Circuit Court to pay Brown's debt. To do so, would have the effect practically to defeat the execution of the order of that court, by diverting the means intended to pay Brown's debt to other purposes.

But we hold that complainants are entitled to an account to ascertain the amount due them from the city, and to have a decree for such sums as may be ascertained to be due them.

The Chancellor's decree overruling the demurrer will be affirmed, and the cause will be remanded for answer and for further proceedings, in conformity to the principles of this opinion.

The costs of this court will be paid by the city.

E. L. Belcher, Adm'r, v. David Wickersham *et als.*

1. Subrogation. *Mortgage. Bills and notes. Administration. Insolvent proceedings. Chancery practice.* The heirs of an estate, on the assumption that it was solvent, paid off certain mortgages on lands; subsequently, on discovering their mistake, they claim to be subrogated to the rights of the mortgagors against the lands. *Held*, that if the facts and circumstances show definitely that at the time of payment such right was not intended to be exercised, or could not be exercised without injustice to others, then no such right can be held to exist. They cannot claim benefit of subrogation by any *post facto* intention, wish or interest growing out of subsequent wants. The right and intention must both concur to make a case of subrogation.

   Case cited: Mitchell v. Mitchell, 8 Hum., 361-2.

2. Same. *Same. Judgments and decrees. Lien.* Nor are the heirs in such case, entitled to any priority over other general creditors, because they have paid off judgments had against their intestate, during his lifetime, when the lien of the judgments so paid had expired, by not having been enforced within the twelve months provided by law.

3. Same. *Same. Estoppel.* If the heirs have had their claims proved before the Clerk and Master, and had them allowed as simple creditors in his report, it being confirmed without exception, the court say: It is probable that this of itself would operate as an estoppel upon the heirs, as showing a purpose not to rely on the right of subrogation. The parties may come in on the footing of their claim for debts paid, by virtue of such report and its confirmation, by a decree of the court, which has not been disturbed, and cannot now be assailed.

4. Same. *Same. Suggestion of insolvency. County Court. Per Curiam.* We held at the last term, in the case of Bryant v. Campbell, that by statute, suggestion of insolvency can alone be made in the County Court. But treating the suggestion as a nullity, under a bill for the administration of a complicated estate, with all parties in interest before the court, they will be bound by a decree apportioning the fund among them upon principles of equality.

FROM SHELBY.

Appeal from the Chancery Court. R. J. Morgan, Chancellor.

E. L. BELCHER, H. G. SMITH and GEO. GANTT for complainant.

SMITH & JEFFERSON for defendant.

FREEMAN, J. delivered the opinion of the court.

James Wickersham died in Memphis, June 1866, leaving five brothers and one sister, resident in Massachusett and Ohio, as his only heirs and distributees. Administration was regularly granted on his estate at July term of County Court of Shelby county, to E. W. Wickersham. Only about $5,639 came to his hands of personal assets, but the intestate had left, what was then thought to be a splendid estate in lands and city property, estimated at from $200,000 to $250,000 in value. Wickersham, the first administrator, proceeded with his administration until April 12th, 1868, when he made a settlement, resigned and was discharged of his trust. The present complainant, E. L. Belcher, was then appointed administrator *de bonis non*, and entered at once upon the duties of his office. The original bill in this case was filed by him May 13th, 1868, and goes in its main features upon the idea of seeking a sale of real estate descended to heirs, for the payment of debts, the personalty having already been exhausted by the previous administrator properly, unless possibly some stock in the Memphis Theatre Company remained as personalty, which we need not notice or determine at present. The allegations of the bill in this feature of it, are all made in conformity to the act of 1827, ch. 54, embodied in the Code, section 2267. It contains a prayer based

on its statements, that the court will order the sale of so much of the real estate as may be proper for the purpose of paying the debts ascertained by an account, and that such debts and demands as may have been proven and allowed be paid, and for all proper orders and decrees necessary for carrying out the objects of the bill. In addition, however, to this is asked, "that to this end, the matter of the administration of said estate and all complainant's accounts and settlements as such administrator, be transferred from the County Court of Shelby to this, (the Chancery) Court," and then a prayer for such other and general relief as the nature and equity of the case may demand.

It is proper to say here, that this bill contains a history of the previous administration, together with that of a number of the largest debts due from the estate, with statement of dates and amount secured by mortgages, deeds of trust, and perhaps judgments obtained in the lifetime of James Wickersham. These creditors are made parties to the bill, and publication is asked to be made for all others having debts or demands of whatever kind against the estate, to come in and make themselves party to the proceedings for the purpose of having their claims allowed.

In this last aspect of this bill, as well as in the matter contained in its general features, it may well be taken as a bill by an administrator, in a case of complication, to administer the estate under the direction of a court of chancery, sometimes called a bill of conformity, because by it, the administrator undertakes

to conform to the decrees of the court, or the creditors are compelled to do so. See Story Eq. Jur., Vol. 1, sec. 544, and snoceeding sections.

Passing from this, however, we proceed to the feature of this case which brings up the main questions to be determined by us on this appeal.

On July 1st, 1872, the heirs of James Wickersham, who were made defendants to the original bill, filed a petition in the cause, in which they set forth the matters of equity now to be determined. This petition was dismissed by the Chancellor, from which an appeal is prosecuted to this court.

We need not go into the details minutely of the matters thus stated, but will only refer to such matters as may serve to raise the questions debated before us, and raised by the record. It is proper to say here, however, that under the original bill an account of considerable indebtedness of the estate had been taken, and a portion of the lands had been ordered to be sold by special commissioners agreed on by the parties, and some of these lands had been sold in pursuance of said decree. In the meantime, in August, 1870, it had been suggested to the court, that the estate was insolvent, so that this fact may be assumed as ascertained and well known to petitioners before filing the petition of July, 1872.

This petition commences by asking that the biddings be opened as to sale of a valuable piece of property known as the old post office building, which had been bid off by Henry G. Smith at $20,000, but which had not been confirmed. They offer to advanc

the bid on said property to the sum of $23,500. They claim that the estate is indebted to them in largely more than this sum, and that they are entitled to be paid what is due them in full, whether the estate is solvent or insolvent. They offer to take the property at a cash valuation for the above sum, less taxes and charges that may be upon the same, and credit their debt with the amount. They then proceed to give the history of their claim thus set up, which is substantially as follows:

That the estate was deemed at first amply solvent, and for several years after the first administration granted. That next to the real estate, a large amount of theatre stock was deemed most valuable to the estate. That the estate, however, had turned out very differently from first calculations, owing to the depreciation in value of real estate. The estate had, however, been estimated at $200,000, while the debts up to May, 1868, were not thought to be more than $54,000. A large portion of the estate descended to the heirs was encumbered by liens, some mortgages, some deeds of trust, judgments and taxes, State, county and municipal. The theatre stock also was encumbered by two mortgages to the extent of over $11,000. There was other large indebtedness, but as petitioners say correctly, no suspicion of insolvency. We may add, on the contrary, it was thought by the heirs, that they had inherited a magnificent estate. In fact, if property had remained at its then value, it is probable it would have been a considerable estate, if pru-

dently managed, notwithstanding the large indebtedness ultimately developed.

However, to proceed, it appears that the heirs, anxious to save the real estate, in connection with and by the assent of the administrator, undertook to discharge the debts and incumbrances on the property descended to them. In carrying out this purpose, they appropriated a very large sum derived from the rents of the property, together with proceeds of a portion of the real estate which they sold, to payment of these debts. In this way and by means borrowed, they claim to have discharged upwards of $117,000 that was against the estate; of this sum they say upwards of $75,000 was obtained from rents of the property and sales of land, leaving upwards of $40,000 paid over and above the sums derived from the above sources.

This is, in substance, the statement of the petition, though the precise amounts we have not assumed to give. While claiming that the rents were not bound to have been appropriated to payment of debts, but were their own moneys, at any rate until after suggestion of insolvency, they say, they are not inclined or disposed to make any claim as to them, at least if the remainder of their claim is allowed in full. If not, however, they insist on their entire claim. The main point of their claim rests on the assumption, that they paid debts that were encumbrances fixed on the land, either by mortgage, deeds of trust, judgment, or taxes which were liens, and that these payments were made when the estate was deemed solvent by all, and being administered by the administrator as such.

We will examine these questions so far as is necessary separately, as some of them probably stand on grounds variant from the others. We will not go into particulars so as to fix the time when payments were made, for instance, on the judgments, but content ourselves by laying down the principles on which the rights of the parties rest in each particular case or class of cases.

First, as to judgments had against James Wickersham in his lifetime. It will be seen, that the ground on which petitioners stand, is the right to subrogation to the place of creditors whose debts they have paid, which can and does only mean, that they stand in their places, take their shoes, as to these debts, on the principle, as it is sometimes stated, of an equitable assignment of the debt; that is, not an assignment in fact made, but a payment made under such circumstances that a court of equity treats it as an assignment in law, and gives the party paying the benefit of the debt with its securities that were in the hands of the creditor, for his reimbursement. This is very clearly deducible from the statement of one case illustrative of the application of this doctrine by Mr. Story, Eq. Jur., Vol. 1, sec. 562. He says: "If a specialty creditor, whose debt is a lien on the real estate, receive satisfaction out of the personal assets of the deceased, a simple contract creditor, (who has no claim except on these personal assets), shall in equity stand in the place of the specialty creditor against the real assets, so far as the latter shall have exhausted the personal assets in payment of his debts,

and no further. If, however," he adds, "the speciality creditor himself cannot affect the real estate, as if the heirs are not bound by the specialty, or if there is no personal covenant binding the party to pay, or if the creditors are not creditors of the same person, and have not any demand against both funds, as being the property of the same person; in these and the like cases there is no ground for the interposition of courts of equity."

Such is the uniform statement of the principle, involving at all times the idea of substitution to the rights of another, but to nothing more. Such is the principle administered by this court in the case of *Mitchell* v. *Mitchell*, 8 Hum., 361–2, where a legatee who had paid a judgment, or execution, which was a lien on slaves, and the right to subrogation to the right of the creditor in the case was upheld, but only to the precise rights of the creditors, as appears from the whole case, the right of the party paying one of the debts, which had not been reduced to judgment, being held only to constitute such party a simple creditor, as was the party who held the debt. *Ibid*, 361.

This must be so on sound principle as well as authority, for the party paying the debt of another, and seeking reimbursement by way of subrogation, cannot be held to have changed the character of the debt thus paid, to have given it any more dignity by such payment, nor to have added anything to its effectiveness, as a charge upon the debtor, whose debt has been discharged.

Assuming this to be settled, the result is, that if

the lien of the judgments paid off, recovered against James Wickersham in his lifetime had expired, by not having been enforced within the twelve months provided by law, before payment by the heirs, then there was no lien to which they could be substituted by reason of such payment, and they could not create one or revive an expired one by simply paying the judgments. It is not denied in argument, we believe, that such is the fact with reference to the judgments paid off by the heirs. See L. Cases in Eq., Vol. 1, 145 *et seq.*, and cases cited.

This disposes alone of the question of priority by reason of the assumed judgment lien on this aspect of the question.

The next question presented for consideration is, as to the claim to be paid in full, based on payment of debts secured by mortgages and deeds of trust.

The property known as the post-office building and the library building, with the lots on which the houses are situated, comprise, we believe, the landed estate which was thus charged—at any rate, this property is the principal property thus encumbered by mortgage or deed of trust. The facts in reference to this property may be briefly stated as follows: J. Wickersham in his lifetime, had given various deeds of trust that need not now be specified, on this property to secure payment of large debts. In 1867, the heirs made an arrangement by which they took up the former deeds of trust, got additional time on the debts secured on the post office building, perhaps paying something on them in cash, and gave a new deed of trust on this

property to secure the amounts due. This deed was made to different trustees, and was evidently intended at the time, and did satisfy and discharge the former trust deeds on the property. They claim now, however, that having satisfied these debts, they are entitled to be substituted to the rights of the creditors thus paid, under these deeds of trust. This claim cannot be allowed on any principle which we deem sound. First, it is beyond all question, that the right to subrogation is to arise, and must grow up at the time of payment. It is a right that the party can waive if he chooses so to do. It cannot be forced on him; on payment in the case of a surety, (the most common case of subrogation), the surety has the right to stand in the place of the creditor, as to securities he may have taken from his principal, and have them enforced for his benefit, but he cannot be compelled to resort to this remedy; and Mr. Dixon, in his work on Subrogation, lays it down, "that he has option to resort to his principal directly, or to become substituted to the creditor's rights." Sec. 175. He even maintains that some act is necessary on the part of the surety, to manifest his election and to show acceptance of the right which the law gives him. Without, however, going thus far at present, we think it beyond doubt that the option, in all cases where the right of substitution may arise, is with the paying party. If the facts and circumstances show definitely, that at the time of payment, such right was not intended to be exercised, or could not be exercised without injustice to others, then no such right can be held to exist. How are the

facts here? A new deed of trust on each of these properties is given, and thus the old ones satisfied. Certainly it was not intended at the time that the last deeds should be in the nature of second mortgages, and subject to the first. But again, could the former deeds of trust have been enforced against the property after execution of the second ones? Certainly not, and why? Because the first were satisfied, cancelled, and by clear understanding of all parties were never to be held as existent charges on the property. This alone disposed of them and forever. The heirs cannot now come in and claim the benefit of them, by any *ex post facto* intention, wish, or interest which may have arisen to them, growing out of subsequent events. Such is the doctrine laid down in L. Cases in Eq., Vol. 1, p. 155, where it is said that even in case of surety, "the question whether he meant to purchase or to extinguish, is a question of fact, and not of law, it being settled that the right and intention must both concur to make a case of subrogation. Hence a payment even by a surety will be an extinguishment, and consequently preclude the right to be subrogated, if the circumstances of the case, or his accompanying declarations are such as to show that he meant to extinguish the debt, and not keep it alive for his benefit." See also *Starr* v. *Ellis*, 6 J. Ch. R., 396; *Gardner, Adm'r*, v. *Astor*, 3 J. C. R., 55. In these cases the mortgages had been paid off by the owner of the equity of redemption and assigned to him. It was held by Chancellor Kent, that they were forever extinguished, unless something had been done at

the time of taking them up, with a view that they should be kept alive. Numerous authorities might be cited to the same effect.

Here we may close this branch of the case by saying, that it is not only not shown that these parties intended to keep alive any charge on this or any other property; but on the contrary it is clearly shown, that at the time of paying them, and for years after, they had precisely the opposite purpose. This is evidenced in the clearest manner, not only by all the facts in the record, but most strikingly in the statements of the petition of the parties, in which they show, that the debts were paid with the view of relieving the estate entirely from the burden, and thus saving to the heirs what they deemed at the time a fortune, in property yielding a splendid income, as evidenced by the fact that about seventy-five thousand dollars of debts had been paid out of the rents in a few years. But, one other fact is conclusive against the parties in this view; that is, that they proved their claims before the master, had them reported on and allowed, as simple creditors, in the report filed February, 1870, which report was confirmed without exception 25th of March afterwards, and is one of the debts for which the real estate is ordered to be sold. It is probable that this of itself would operate as a conclusive estoppel upon the heirs, as showing definitely a purpose not to rely on the right of subrogation in this case.

It is insisted, however, that all this was done under a mistake of facts, and therefore cannot be held to

affect the claim now made. This cannot avail them, because it is extremely doubtful whether there was any mistake of the facts as they existed at the time; the property was then estimated at value perhaps sufficient to have justified the conclusion that the estate was amply solvent. The shrinkage in value since that period has changed all this, but this is only a misfortune to the parties, and cannot be properly used as the basis of a claim based on the idea of a mistake of facts, against which relief should be granted. In addition, it may well have been, that if the heirs had not intervened, the creditors, or the administrator, would at an early period have resorted to the real estate for the satisfaction of their debts, had it sold while prices were high, and it yielding a splendid income from rents, and thus all creditors might have been paid—probably a surplus left to the heirs.

Be this as it may, we are well satisfied with our conclusion, that they have now no right whatever to stand as preferred creditors, and be allowed to receive their claim in full, to the exclusion of other creditors of the estate. This conclusion applies equally to the theatre stock, the trusts on which they discharged, and for the same reasons.

It is proper to say, that we do not deem it necessary to review in detail the authorities cited by petitioners. We have examined them carefully, and have contented ourselves with stating what we hold to be the sound rule applicable to the case before us.

The question seems fairly before us, whether the parties are entitled to come in as other creditors of the

estate on the footing of their claim for debts paid. We think they may, by virtue of the report of the clerk alluded to allowing their claims, which has been confirmed by a decree of the court. That decree stands unreversed, and could not be reversed or reviewed now, because unexcepted to, and must stand as a conclusive adjudication of their rights on this subject.

As to the theatre stock, we hold this property must now be treated as realty belonging to the estate. The stock represented the entire property, and this has been purchased and belongs to the estate, so that the lot and building, as well as the stock representing it, are in the same hands, and the stock thus merged into the property itself. It would be absurd for the same party to hold the real estate and the stock representing it as separate properties.

The question has been presented in argument that this whole proceeding is erroneous, because of the suggestion of insolvency in the Chancery Court alone. That suggestion could alone, by statute, have been made in the County Court, as we held in the case of *Campbell* v. *Bryant et al.*, at last term. But treating it as a nullity, the bill is one well known to the forms of the court as a bill for the administration of a complicated estate, and the chancery court, under this well-settled jurisdiction, can proceed to administer the assets thus brought within its jurisdiction, and appropriate them to the payment of debts in accord with its long settled practice. If not enough to pay debts in full, all the creditors as well as heirs being before the court, and having submitted to the jurisdiction,

will be bound by the decrees and orders made in the case, apportioning the fund among them on the principle of equality. When this is done in accord with the prayer of the bill, the accounts of the administrator will be passed upon by decree of the court, and thus the administration finally settled by binding decree of a court of competent jurisdiction.

The questions made on the exceptions filed to report of the clerk and master, are not before us, as no action was taken on them by the Chancellor.

We believe this disposes of all the questions legitimately before us in the case.

A decree will be drawn in accord with this opinion. The costs of this court will be paid by the petitioners. The case will be remanded to be further proceeded in.

FREEMAN, J., delivered the following additional opinion:

We are asked to examine several questions of detail supposed to arise in this case, in order to a modification of the decree ordered in former opinion.

The case is before us alone on the matter of the petition filed by the heirs.

It is assumed that judgments paid before the twelve months in which the lien existed, are not included in the decision made. This is a mistake. The first proposition on this question refers to payments of judgments made after lien expired, it is true; but the more general propositions of the balance of the opinion

cover all cases of the kind where substitution might be sought. The principle is, that it is at the option of the party praying, in a proper case, whether he claim substitution or not; and that the facts show clearly this was not proposed, but the contrary, that it was a payment of a charge on the land, by the owners as owners and for their own benefit, voluntarily made, with the purpose of finally extinguishing all liens and not of continuing the charge on the property. This includes all payments made by the heirs as far as we can see, except amount paid for theatre stock. All we find in the petition in reference to this stock is, that the heirs claim to have purchased it for the estate, and yield the estate in their petition. They do not ask any reimbursement for it in the petition, but by fair implication it is excluded from the petition as a claim, by confining the relief sought expressly to the matters specified.

We need not discuss this question, as it is not before us in a form to further authorize its decision on the petition from which the appeal is prayed.

As to costs of this court, on reflection, we think they may well be charged to the administrator, or the estate rather in his hands, as petitioners have succeeded in modifying the decree of the Chancellor, which simply dismissed it.

With this change, the decree will be drawn as directed in former opinion.

W. P. LANKFORD, Adm'r, of W. J. Lewis, dec'd, v. MARY A. LEWIS *et al.*

and

MARY F. LEWIS v. S. M. GLENN, Guardian, etc., *et al.*

HOMESTEAD. *Dower. Widow not entitled to both. When. Administration.* Where a husband has died in 1869, the rights of his widow to homestead, etc., are determined by the act of 1868, which does not enlarge the widow's rights or interest in her husband's estate, as against the administrator. A homestead is not among the articles exempt from execution, which descend to the widow, and not to the administrator; her rights to such, are as the head of a family, against a creditor, who is seeking to enforce his debt, by execution or attachment.

Case cited: Merriman v. Lacefield, 4 Heis., 220.

Code cited: Sections 2114*a*, 2115.

Acts cited: Acts of 1868; Sec. 2, 1870.

FROM LAUDERDALE.

Appeal from the Chancery Court. H. S. LIVINGSTON, Chancellor.

WILKINSON & WILKERSON for Lankford.

LYNN & OLDHAM for M. F. Lewis.

STEELE, MARLEY & STEELE for Glenn *et al.*

FREEMAN, J., delivered the opinion of the court.

W. J. Lewis died September, 1869, leaving complainant in the cross-bill his widow, and the six de-

fendants his children, as his heirs; as stated at the bar, the children are his children by a former wife. Lewis left two tracts of land. The widow petitioned for and had her dower assigned her in the lands of her husband; after this, a petition was filed by the administrator to sell land for the payment of debts, on the ground of exhaustion of personal assets. In the decree ordering the sale, it is stated that the widow "waives her right of homestead as against the debts of the estate, but reserves her right to her homestead out of any land after the debts of said estate have been paid." This decree was made May term, 1872.

The case has been argued before us on the assumption that the widow was entitled to the benefit of the homestead in addition to dower, under the act of March 12th, 1868. The right of the widow, it may be correctly assumed, whatever it is, rests on this act, the husband dying in 1869.

The act of 1868 is as follows, Sec. 2: "That the homestead of any housekeeper or head of a family, residing in this State, to the value of one thousand dollars instead of five hundred, as now provided by law, consisting of a dwelling house and out-buildings, and land appurtenant, occupied by such person as a homestead, shall be exempt from execution or attachment, for the debts of any such head of a family or housekeeper."

We think it too clear for argument, that this act alone applies to, and gives the homestead as against a creditor of the head of a family or householder, who

is seeking to enforce his debt by execution or attachment, against such householder or head of a family. It is true Sec. 2115, which requires the declaration of intention to claim a homestead to be registered, is repealed by the act, but the other provisions remain, and only provide the mode of setting it apart, but do not give any right to the widow, or any estate to her in the land. In fact her rights are not intended to be affected by these statutes, she being simply left as before to her right of dower on the death of the husband. The first act that gave her any rights on this subject, was the act of 1870, passed in pursuance of the provision of the constitution of 1870; see Code, sec. 2114*a*.

The court below seems to have followed the supposed opinion of this court in the case of *Merriman, Adm'r, et als.* v. *John H. Lacefield et als.*, 4 Heis., 220. It is not very clear what was the view of the learned judge in that opinion on this question, but if the opinion can be construed into holding that the widow was entitled under this act, to dower as well as homestead, it is not sustained by the statute and is not law.

The homestead as provided for by law is given by our statutes, and only by them, so that it attaches alone where so given. A homestead was never intended to be included by any of our statutes, under the idea of articles exempted from execution, which go to the widow, and not to the administrator by our statutes. The language of the act of 1868 is too clear to admit of doubt in its construction, and only gives the ex-

emption as against a creditor with attachment or execution.

In this view of the case, the decree below must be reversed, and the cross-bill dismissed at the cost of the widow.

CITY OF MEMPHIS *v.* R. F. LOONEY *et al.*

1. MUNICIPAL CORPORATIONS. *Power and means of collecting taxes under act of* 1873, *ch.* 102, *etc.* The city of Memphis filed a bill under the act of 1873, ch. 102, to which objection was made by demurrer, that the bill alleges lands and lots had been sold for taxes and bid in by the complainant, and points to no defect of title under the proceeding for sale; that, according to the allegations of the bill, complainant has acquired a perfect title, and her remedy is by an action of ejectment. *Held*, the act of 1873 gives the Chancery Court jurisdiction to evict persons from land in behalf of a corporation, that has bid the same in, at the prices of the taxes due thereon.

2. SAME. *Same. County commissioner need not be party. When.* The power given to the county commissioner to sue is merely cumulative to that of the corporation already vested by law. It is not necessary that the suit should be brought in his name.

3. SAME. *Same. Statute of limitations.* It is not in the power of the corporation to relieve one and impose upon another a burden, and no laches on its part, or that of its officers, can defeat the right of the public to have collected and rightfully appropriated the public taxes. As against this right, there is nothing of such a character that justice requires an estoppel, or limitation should be asserted.

FROM SHELBY.

Appeal from the Chancery Court. R. J. MORGAN, Chancellor.

S. P. WALKER, G. A. HANSON and O. W. METCALF for complainant.

PIERCE & DIX for defendants.

TURNEY, J., delivered the opinion of the court.

The bill was filed under the act of 1873, ch. 102, approved March 21. The preamble is: "Whereas, the different municipal corporations in the State have, from year to year, become the purchasers of large quantities of land by bidding the same in at the prices of the taxes due thereon; and whereas, by reason of the irregularity and void character of said sales, the said municipal corporations have been defeated for many years in the collection of a large amount of taxes: Now, therefore, for the purpose of effecting an early collection of said taxes by an enforcement of the lien of said municipal corporations upon said lands for the same:"

The first section enacts in substance that commissioners elected under the act of December 6th, 1871, for the collection of taxes due the State, are empowered, if authorized by an ordinance of the municipal government, to collect all unpaid taxes due the corporation in accordance with the provisions of this act.

Section 2 enacts: "That the revenue collectors of the said municipal corporations shall, within thirty days after the passage of this act, or as soon thereafter as practicable, furnish to said commissioners a descriptive list of all lands and town lots within the corporate limits of the said municipal corporations which have

been condemned and sold for taxes due the said municipal corporations since the year 1865 inclusive, and bought in by the said municipal corporations and not redeemed, together with the amount of taxes due thereon."

Section 3: "That such commissioner, upon receiving said list, shall without delay proceed to collect the taxes due upon the respective parcels of land described therein; and for this purpose he may file his bill in the chancery court for the county where the lands lie, in his own name as commissioner of revenue, for the use of the municipal corporation, and against the parties owning or claiming the lands at the date of filing the bill," etc. . . . . .

"The bill shall allege the lien of said municipal corporation upon said lands for unpaid taxes assessed against it, and shall pray for an enforcement of the same by a sale of said land and an application of the proceeds to the payment of said taxes."

The complainant accepted the provisions of this statute by the passage of an ordinance directing the institution of suits.

The demurrer makes the objection that the bill alleges the lands and lots had been sold for taxes and bid in by complainant, and points to no defect of title under the proceedings for sale; that according to the allegations of the bill complainant has acquired perfect titles, and her remedy is by action of ejectment.

In the absence of the statute, the objection might perhaps be well, but as already seen, the preamble

and enacting clauses of the statute embrace all lands sold for taxes. The revenue collector for the corporation is to furnish to the county commissioner a list of *all lands and town lots which have been condemned and sold for taxes.*

And such commissioner shall without delay proceed *to collect the taxes due upon the respective parcels described in the list*, and for this purpose may file his bill in chancery. No distinction is taken as to lands sold under regular proceedings carrying with them a perfect title by virtue of a sale thereunder, nor are such lands excluded by implication from the operation of the statute, but on the contrary, are included in its express terms.

The *list of all lands and town lots sold and the taxes*, etc., is the only guide to the commissioner in the bringing of suits. He is not required to investigate titles, to pass upon the regularity of sales, but simply to collect the taxes, and for this purpose may pursue the remedy in chancery given by the statute.

In cases in which the sales are regular and valid, no hurt can result to them for whose taxes the sales were made. The statute converts the absolute title into a lien, and preserves to the owner the right to reinvest himself upon the payment of taxes due.

The passage of the ordinance for the bringing of the suit and the institution of the suit by the corporation, is an acceptance of the terms of the statute and a recognition of the legal title in the original owner, and the claim of a lien merely by the corporation. If, however, such owner prefer, he may dis-

claim title in himself, and be relieved of costs accruing in the proceedings under the bill, to which by the terms of the act he must be made defendant.

The statute is to the mutual benefit of the corporation and the tax-payer, in curing the evils of defective sales and relieving against such as are regular and valid. It is argued that the suit should have been in the name of the commissioner, as provided by law creating the right. We answer, the commissioner for the county is not an officer of the corporation, nor subject to its control, and cannot be compelled by it to bring suit. If the corporation elect to proceed against him for his failure to sue, it must do so by bill in chancery, bringing with him the defaulting tax-payers, as well as the list of the lands and lots for which the taxes are unpaid, accomplishing by this means precisely the same results as are accomplished in a bill without having him before the court. Besides, the power given him to sue is merely cumulative to that of the corporation already vested by law.

It is urged the statute of limitations of six years obtains as to part of the taxes claimed to be due.

The first item is for the corporate year from January 1, 1868, to January 1, 1869. The statute under which the bill is filed was passed March 1st, 1873, and goes back to and includes the taxes due in 1865. This was, by legislative enactment, an extension if not an abolition of the statute of limitations, (if any existed) as to all taxes not due for the term of six years at the passage of the law. We are of opinion, however, that no statute of limitations will or can apply; we

concur in the rule laid down by Judge Dillon in his Law of Municipal Corporations, Vol. 2, sec. 533, as follows: "Upon consideration it will perhaps appear that the following view is correct: Municipal corporations, as we have seen, have in some respects a double character—one public, the other, (by way of distinction) private. As respects property not held for the public use or upon public trusts, and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within limitation statutes and be affected by them. For example, in an action on a contract or for a tort, a municipal corporation may plead or have pleaded against it the statute of limitations. But such corporation does not own and cannot alien public streets or places, and no laches on its part or on that of its officers can defeat the right of the public thereto; yet there may grow up in consequence private rights of more persuasive force in the particular case than those of the public. It will perhaps be found that cases will arise of such a character, that justice requires that an equitable estoppel shall be asserted, even against the public, but if so, such cases will form a law unto themselves and not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine, that as respects public rights, municipal corporations are within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an *estoppel in pais* as applicable to such cases, as this leaves the court to decide the question, not by the

mere lapse of time, but by all the circumstances of the case, to hold the public estoppel or not, as right and justice may require." We think the rule eminently sound.

The case before us comes strictly within it. All the citizens of the corporation are interested in its taxes and their prompt collection. They are presumed to be levied for the public good, and each citizen who receives the benefits should share the burdens of municipal governments; taxes are levied and collected for the public use and upon public trusts. It is not in the power of the corporation to relieve one and impose upon another a public burden, and no laches on its part or that of its officers can defeat the right of the public to have collected and rightfully appropriated, the public taxes. As against this right there is nothing of such a character that justice requires an estoppel or limitation should be asserted.

Reverse the decree.

L. B. HORRIGAN in error *v.* FIRST NATIONAL BANK and W. W. THACHER.

1. FRAUD AND DECEIT. *Party making representations that afterward become false. Not liable. When.* Horrigan applied to Thacher, the cashier of a bank, for information concerning the solvency of Toof, Phillips & Co.; Thacher replied favorably as to their credit, and upon this assurance plaintiff, from time to time, purchased large amounts of the bills and acceptances of said firm. Eight months later, Toof, Phillips & Co. failed, and plaintiff lost $2,000 by his investments; thereupon he brought suit against Thacher and the bank for deceit. *Held*, an honest statement of a mere opinion, however erroneous, as to the solvency or reliability of another, cannot furnish the grounds for an action of this character. A party cannot be held, in such a case, to have given a continuing guaranty against future contingencies, nor to have bound himself to notify the other of what he may well be assumed to be able to discover for himself.

Case cited: Wynne & Co. v. Allen, MS.

2. PRINCIPAL AND AGENT. *Bank not liable for acts of cashier. When.* Answering questions as to the solvency of parties, is no part of the business of a cashier of a bank, nor fairly included within the scope of such business. It may be, and probably is, an accident of such position, but not an incident to it. *Held*, no liability attaches to the bank in such case.

3. BILLS AND NOTES. *Guarantor released by conduct of holder. When.* When the holder of paper has given credit to a third party upon the recommendation of a cashier of a bank, and the debtor is ready and offers to pay the note at maturity, and the holder instructs the cashier to give the debtor an extension of time, which the debtor accepts, and then fails, the cashier, though he had rendered himself liable by the recommendation, is discharged by the release of the holder.

FROM SHELBY.

Appeal from the Second Circuit Court. J. HALSEY, Judge.

GEO. GANTT, H. C. YOUNG and T. B. TURLEY for complainant.

HUTCHINSON & TOWNSEND for defendants.

FREEMAN, J., delivered the opinion of the court.

This is an action by Horrigan against the Bank and W. W. Thacher, individually, for deceit. Thacher was the cashier of the bank, and plaintiff applied to him in 1872 for information as to the solvency of the firm of Toof, Phillips & Co., a business house in the city of Memphis. It is averred in the declaration that Thacher replied, assuring plaintiff that he was well advised and informed as to the condition of said firm, and on being informed that plaintiff purposed purchasing acceptances and bills of exchange on said firm, if assured of their solvency, Thacher told him the firm was solvent and in prosperous business and financial condition, and that such purchases would be, in the judgment of defendant, a prudent and safe investment. The gravamen of the declaration is, that plaintiff, relying on these assurances, from time to time purchased a large amount of bills and acceptances of said firm, amounting in all to $15,000, and that the statements made by defendant were not true and proved to be so, and that such investments were imprudent and risky, said house being known by defendants to be involved, and said representations were false, fraudulent and deceitful.

It is alleged that by reason of said representations plaintiff had thus been induced to buy, and had suf-

fered a loss of an unpaid balance on his purchases to the amount of $2,000.

We need not at present go into the testimony in the case, as it is clear no reversal can be had for want of evidence to sustain the verdict, if the law was correctly given to the jury by the court below. It is insisted, however, very earnestly that this was not done, and we proceed to examine the questions presented in argument in this view of the case, and determine whether such errors exist.

The leading principles on which this action is sustainable, are few and simple. The gist of the action is fraud and deceit in the party making the representations, and damage to the plaintiff by reason of such fraud and deceit in the representations made. 1 Mete., p. 6. As said in 13 Vesey, 133, cited in the above case: "The proposition is not that if a man being asked whether a third person may be trusted," answers, "you may trust him; he is a very honest man and worthy of trust," an action lies if he proves otherwise. There must be knowledge at the time. That is the sound principle, that the defendant knowing that person to be dishonest, insolvent and unworthy of trust, made the representation." The like principle is more fully stated by Judge Deaderick, after a very full review of the authorities in the case of *Wynne & Co.* v. *Allen*, MS. He says: "The result is, that if a party represents as true, that which he knows to be false in such a way and under such circumstances as to induce a reasonable man to believe that it is true and it is meant to be acted on, and

the person to whom the representation has been made believing it to be true acts upon the faith of it and by so acting sustains damages, such representation is fraudulent and will sustain an action by the party damaged."

While these cases hold the party must know his representations to be false in order to make himself liable, and such is the general rule, there might be a case where a party would be liable for stating as true, with a view and purpose to influence another party to trust a third party, that which he did not know. The purpose to influence the action of the party, however, by such statement as to facts by which that other party was injured regardless of their truth, would be the essence of the liability in such a case. We need but say that an honest statement of a mere opinion, however erroneous, as to the solvency or reliability of another, could not furnish the grounds of an action of this character.

We have carefully examined the charge of the circuit judge in this case, and think it in its essential features is not only a correct statement of the principles of law applicable to the main facts of the case as against Thacher, but that it is even very favorable to the plaintiff, more so probably in some respects than was strictly accurate. For instance, he goes, in one part of his charge, on the idea and so tells the jury, that if Thacher knew plaintiff was buying Toof, Phillips & Co.'s paper on the faith of the representations made by him, and their circumstances had changed so that, as he says, "these representations had become

false," it was Thacher's duty to have notified plaintiff and put him on his guard, otherwise he would be liable. While this is sound morally, and under some circumstances might be sound law where the party trusting to the representations lived at a different point, and might be assumed to rely entirely on the statements of his correspondent, yet it is very questionable whether the principle could be fairly applied to the case of parties all residing in the same town or city where the party buying paper might be expected, as a man engaged in such business, to look after his own interest, and had equal means of information or opportunities to acquire knowledge with any one else as to the changes in the situation of his debtor.

It could not fairly be assumed that where the cashier of a bank is applied to for information as to the solvency of a party and gives that information truly, that he thereby undertakes to watch over the interest of such party in the future; assumes a sort of guardianship over it and is expected to be responsible if he fails to give notice of change of circumstances or reverses in trade that may befall the party about whom he has given information. The more natural and sounder view of the question would be, that if any future information was wanted he would again be applied to under such circumstances, and if no application was made he might well assume that the party whose interest was at stake, like other business men, was able to take care of himself and was guarding his investment with the watchfulness of one most concerned in the result. A party cannot be

held in such a case to have given a continuing guaranty against future contigencies, nor to have bound himself to notify the other of what he may well be assumed to be able to find out for himself. We do not deem it necessary to elaborately explain our approval of the correctness of the charge of the court below. It suffices, as we have said, that it is most favorable to the plaintiff, and if erroneous it is in this aspect alone, of which plaintiff cannot complain.

We do not think the bank, in any aspect of the case, could be held responsible for the representations made by its cashier. There may be cases where such liability might be incurred by the corporation by reason of representations made by the agent, such as the president or cashier. It must, however, be on the principle stated by the Court of Exchequer in case of *Barwick* v *Eng. Joint Stock Co.*, that the principal has placed the agent in his place to do that class of acts, and he is held to answer for the manner in which such agent has conducted himself in doing the business which it was the act of the principle to place him in. See 2 Law Reports, 265.

Answering questions as to the solvency of parties is no part of the business of the cashier of a bank, nor fairly included within the scope of such business. It may be and probably is an accident of such a position but not an incident to it. The bank was not applied to for information in this case, but Thacher. He was applied to no doubt because of his supposed knowledge of the business of such houses growing out of his position, or acquired by reason of his position.

But his information would have been as full, as said by the Court of Queen's Bench in case of *Swift* v. *Jewsbury*, Law Reports, 1874, p. 314, had he been turned out of his office twenty-four hours before he was applied to, and worth as much as an ex-cashier as when he was cashier. It was his information that was wanted, his opinion that was sought, not that of the bank. It was his opinion that was given and acted on at first, and not the opinion of the bank, and on no sound principle can the bank be held responsible for such an opinion under the circumstances of this case. We have carefully examined the cases cited by plaintiff supposed to favor the liability of the bank, but do not think they sustain his view, and if they did we would not feel bound to follow them or hold them applicable to the case before us.

There is, however, a ground that we think would be conclusive against plaintiff in this case. It clearly appears that on the day the paper fell due on which the loss was sustained, plaintiff was in Jackson, Tennessee. The house of Toof, Phillips & Co. had made arrangements to meet it, but desiring an extension of time on it, they telegraphed to plaintiff and he replied to the cashier, (Thacher) to suspend collection until he (Horrigan) should get back to the city. When one of the partners went to the bank to pay the bill he found this telegram in the hands of Thacher, accepted the offer of an extension as a matter of course, did not pay but used the money in other business. Had not Horrigan given the extension of time, there would

have been no loss. He cannot complain of the result of his own voluntary act.

We see no evidence whatever of complicity on the part of Thacher with Toof, Phillips & Co. in seeking this extension; on the contrary, the proof shows it was asked by the house without consultation with Thacher and without his knowledge. We are totally unable to perceive the force of the argument, that it was Thacher's business to notify Horrigan that the firm was then pressed and advise him not to give the extension. He was not the guardian of the interest of Horrigan, and certainly owed no such duty by reason of having told him of the situation of the firm eight months before, when called on for the information. We do not think it necessary to examine in detail the requests to charge numerous propositions made by plaintiff. The law as charged presented the real case before the court fairly and fully, and the principles governing it.

We are well satisfied that the case should be affirmed on the facts, and that the law has been administered certainly most favorably to plaintiff's case.

Affirm the judgment.

LUKE E. WRIGHT, Attorney-General, etc., v. COUNTY OF SHELBY.

1. DISTRICT ATTORNEY-GENERAL. *Fees of. Costs. Office and Officers. Motions against circuit clerks.* The District Attorney-General is entitled to a fee of $2.50 only in each case of failure by clerk to enroll cases determined in his court, such failure being a misdemeanor.
Code cited: Section 4545.

2. SAME. *Same. Statute of limitations.* In pursuance of his duty under Sec. 3228 of the Code, the District Attorney-General can have his motion against delinquent clerks at any time, until the proper statute of limitations forms a bar.
Code cited: Section 3228.

3. SAME. *Same. County liable for fees. When.* In cases where execution upon the motion is returned *nulla bona*, the county, in which such motion is made, is liable for fees of the District Attorney-General.
Code cited: Sections 4542, sub-sec. 15, 4543–4, 5585–6, 5569–70.

FROM SHELBY.

Appeal from the Circuit Court. C. W. HEISKELL, Judge.

W. C. FOLKES for the appellant.

J. A. TAYLOR and M. MERRIWETHER for defendant.

FREEMAN, J., delivered the opinion of the court.

Plaintiff, as attorney-general, moved for judgment against Boyle, clerk of the second circuit court of Shelby county, in the city of Memphis, for the failure to enroll cases determined in his court, in which he

had collected enrolling fees. There were upwards of nineteen hundred cases in which such failure had occurred. Judgments were had in all the cases in favor of the county trustee, for the use of the county against said clerk. These motions were made by order of the court, upon report of the fact of delinquency on the part of the clerk, made by the attorney-general. The motions were made under Section 3228 of the Code, which is as follows: "Each district attorney of this State shall examine the offices of the clerks of his district at any time of the court, whether enrollments have been properly made or fees charged for enrollments not made, and shall proceed against the clerk guilty of official delinquency, and move for the fees illegally charged, and shall receive a tax fee of five dollars for each case." The judgment rendered against the clerk amounted to upwards of five thousand dollars, and a tax fee was ordered in favor of the attorney-general of five dollars in each case, together with other costs, for which an execution was awarded. The execution was returned by the sheriff *nulla bona*, and thereupon the attorney-general, in January, 1876, moved the court for judgment over against the county of Shelby, based on said return, for the amount of his fees, to-wit, five dollars in each case, as adjudged in the original judgment against Boyle, and asked the court to certify the same to the chairman of the county court for payment. The court refused the motion, holding the county not liable for such fees by law, and taxed the attorney-general with the costs of his motion. A bill of exceptions was tendered, and the

case brought by appeal in the nature of a writ of error to this court.

The question is, as to the correctness of this ruling of the court below.

Boyle was elected clerk in March, 1870, and went out of office 1st of September, 1874. Wright was elected attorney-general in 1870. The motions were made against Boyle in May, 1875, and judgment rendered in July of that year. The cases in which Boyle was delinquent had been accumulating for each year of his official term, only one hundred and eighty-seven of them being for 1874, the last year in which he was clerk. It is perhaps proper to state, that Boyle himself was known by the attorney-general to be insolvent at the time the motions were made, but that one or more perhaps of his sureties on his official bond was understood to be good and solvent.

The ruling of the judge below in this case is sought to be maintained in argument here on several grounds, which we proceed to notice, so far as we deem material to the decision of the question before us.

It is insisted the motions could only be made at each term of the court after it occurred, the statute allowing the clerks six months after determination of cases in which to perform this duty, and the section 3228 requiring the attorney-general to make his examination of the offices of clerks at any term of the court. The examination is to be made by the district attorney at each term of the court, and the proceeding is expected by the statute to follow, as a matter of course, the ascertainment of the offense; but it does

not follow that if for any cause the attorney-general has failed to ascertain the delinquency at the first term, or even failed to make the motion when he had ascertained it, therefore it could not be made at all. Time was not intended to be essential to the right in this case—in fact the Legislature did not intend to fix the first term after the offense, as the only one at which the motion should be made, but only provided it should be done after ascertainment of the liability—as a matter of course the motion would be subject to the bar of the proper statute of limitation. We think there is nothing in the objection. Nor do we think there is any objection to the fact of making a motion in each case where the clerk has been delinquent. The statute by its language evidently contemplates a motion in each case of failure and gives the attorney-general "a tax fee of five dollars for each." In the case of Alston, before us some years since, motions were made in each case, and judgments rendered on the cases before us separately, although this objection seems not to have been urged by the learned counsel who argued that case.

The main question in this case, and the one on which it must turn is, whether the county is liable under the Code to pay the fees taxed in favor of the attorney-general at all. This being a question depending entirely on statutory provisions, we proceed to examine what is the law on this question.

In addition to the provision in 3228, giving a tax fee of five dollars in each case, Section 4542, sub-sec. 15, gives the fee of five dollars for proceeding against

clerk for delinquency in enrolling cause. Section 4543 provides that the fees in the foregoing section are to be taxed in the bill of costs and collected from the defendant whenever prosecutions or proceedings have been successful. The next section provides, where the prosecutions and proceedings have been unsuccessful, or *the money cannot be* collected from the defendants, or the prosecution is charged with the costs, the fees of the attorney-general are paid out of the State or county treasury as other costs in criminal cases.

It is somewhat ingeniously argued that according to section 4544 there must "be prosecutions and proceedings," and that as this is held to be a civil proceeding, the two elements were not combined in the case that authorize the payment of costs by the county. The language is somewhat inartificial, but does not admit in fairness of this construction. The reference is evidently to the short fee bill given in the 18th sub-section of section 4542, which provides for certain fees in various cases; some of prosecutions, as for "each prosecution where the grand jury finds a true bill, but the case is terminated without a trial, $3.00; for successfully prosecuting vendors of lottery tickets, $25.00," and in other sections, for various *proceedings* against delinquents, among others, *proceedings* against clerks for failure to enroll cause. It did not intend that there should necessarily be both a prosecution, that is, a criminal proceeding, and also other proceedings in the same case, in order to entitle the attorney-general to his costs, but only uses the word proceedings in reference to the proceedings referred to, as

contradistinguished from prosecutions, used in the section, thus providing for both cases.

The question in this case really must turn on the proper construction of the provisions of the Code we have just been commenting on, and if a proceeding like this, or this proceeding is one of the proceedings contemplated in sec. 4544, then the question, on a fair construction of its language and purpose, in connection with the other sections in same chapter, as well as general rules on this subject, is, shall the county or State pay the tax fee of the attorney-general?

The chapter commences in first section by giving salary of attorney-general of the State, and then on to the end of the chapter is devoted to fees of district attorneys. This is the special subject of the chapter. We then look again at its language. It first provides for the payment of the district attorney's fees, when the prosecutions and proceedings have been *unsuccessful;* second, or the money cannot be collected from the defendants, or the prosecutor is charged with the costs, the fees of the attorney-general are paid out of the State or county treasury, as other costs are paid in criminal cases. Costs in other criminal cases, or other costs in criminal cases, are provided for in Art. 2d, Title 8, especially from section 5585 on to the end of the article. The above section provides for the State or county in which the offense was committed, or is triable, paying costs in cases subsequently enumerated; sub-sec. 5, where the defendant has been convicted, but the execution issued has been returned *nulla bona.* Then follows section 5586, providing in what criminal

prosecutions the State shall pay the costs, that is, in cases where the party is punishable with death, or confinement in penitentiary; and next section provides, that similar costs in criminal prosecutions for offenses punishable *in any other* way than specified in last section, shall be paid by the county. Sections 5569 and 5570 regulate the mode of verifying the bill of costs by the judge or court before whom the case was tried, and by the district attorney; and that a copy of the judgment and bill of costs, (which is required to be entered of record in previous section), certified by the clerk, and by attorney-general and court, shall be presented to the comptroller, chairman of county court, or county judge, as the case may be, and shall be paid ot eht clerk or other authorized person. The motion in this case simply asked that the court perform this duty, which he refused to do—but held the county not liable at all. In this view we hold he was wrong. For proper costs the county was liable, and if the bill of costs was not correct in its terms, on examination, as required by section 5569, then he should have corrected it, and given judgment, or made the proper entry of the true amount, and certified that, as required.

Was five dollars the true amount? By section 4545 it is provided: "In *no* case of misdemeanor, however, where the county pays the costs, shall the attorney-general's tax fee be more than two dollars and fifty cents." As correctly argued for the attorney-general Wright, "The official delinquency which is the basis of this civil proceeding, is a *misdemeanor*." Giving

this section a fair construction, we cannot avoid the conclusion, that it must be held to apply in this case, and the true amount of fee shall be the two dollars and fifty cents, as allowed or required by this section. The form of the proceeding, whether by indictment or motion in the nature of a civil proceeding, as this was held to be in Alston's case, cannot change the application of the section. It was a proceeding for a misdemeanor, the Legislature authorizing this civil proceeding as the form of the remedy in the particular case, but this does not change the essential nature of the offense for which the proceeding was prosecuted. This being so, we think it follows the correct fee should have been two dollars and fifty cents, instead of five dollars.

We here may remark in closing this opinion, that we think the only real difficulty in the case grows out of the fact of the very large number of cases, and consequently large amount of costs to be taxed. Had it been only ten cases, we hardly think any objections, such as are presented, as we have no doubt in great earnestness by zeal of counsel, would ever have been thought of. The question of the amount is one with which we have nothing to do; our duty but demands we shall fairly ascertain the law, and when this is settled, it must take its course, results or consequences of laws being matters of legislative consideration, but not for us, so far as to swerve our judgments from the clearly ascertained path of duty—when this is seen, we are but to follow it, and give our judgments in accord with the mandate of the law.

We do not deem it necessary to refer to other matters presented in the able argument filed with us for the county. The questions discussed we deem conclusive of the case. Judgment will be entered here in accordance with this opinion, we giving such judgment as the court below should have given.

J. C. REEVES, Ex'r of George W. Reeves, v. J. L. PULLIAM, Ex'r of W. G. Day.

1. SURETY. *Liability of on note. Though Administrator of his deceased principal is protected by the statute of limitations.* Although the administrator of a principal in a note may defeat a recovery upon the note by the plea of the statute of limitations, yet the exoneration of such administrator does not relieve the sureties of his intestate from liability.

2. SAME. *Remedy of surety.* When the surety on such a note is compelled to pay the debt, he then has cause of action against the administrator of either the principal for the amount so paid, or the administrator of a co-security for *pro rata* contribution.

3. SAME. *Right of action accrues. When. Statute of limitations.* When the surety is entitled to his motion, upon rendition of his judgment, yet his cause of action is the payment of the judgment, and the statute begins to run from that time, and not from the rendition of the judgment.

Beaver v. Pulliam.

Cases cited: Maxey v. Carter, 10 Yer., 521; Caplinger v. Vadon, 5 Hum., 629; Marshall v. Hudson, 9 Yer., 57; Bradford v. McLemore, 3 Yer., 319; Shropshire v. Shropshire, 7 Yer., 165; Bank v. Campbell, 7 Yer., 353; Goss v. Gibson, 8 Hum., 197; Kerr v. Clark, 11 Hum., 77.

Code cited: Sections 3625*a&j*, 3626, 2279, 2281, 2784, 2786.

FROM FAYETTE.

Appeal from the Circuit Court. T. J. FLIPPIN, Judge.

CALVIN JONES for complainant.

H. C. MOORMAN for defendant.

DEADERICK, C. J., delivered the opinion of the Court.

At the July term, 1871, of the Circuit Court of Fayette county, Cooke and Dortch, Ex'rs of Josiah Higgerson, recovered a judgment against Em. J. Reeves, principal, and J. G. Reeves and plaintiff as securities. Defendant Pulliam's testator, W. G. Day, was a co-surety on the note upon which the judgment was obtained, but was not sued in the action. Pulliam was qualified as executor of Day's estate in January, 1865, and made his settlement in 1871.

At the July term, 1871, of said circuit court, and after said judgment had been rendered against him, plaintiff entered a motion for judgment over against his principal and co-sureties.

On the 31st March, 1874, the plaintiff paid $710.46, the amount of the judgment and interest thereon, and the sum of $12.80, the costs of suit; and on the

10th July, 1874, he dismissed his motion entered at July term, 1871; and on the said 10th July, 1874, entered this motion against defendant, the executor of his co-surety, Day. The defendant relies upon the statute of limitations of two years and six months, all the parties being resident of said Fayette county, and of seven years as a bar to the recovery.

By sections 3625 and 3625*a* of the Code, a right to a judgment by motion is given to a co-surety against whom judgment has been rendered, or who has paid said judgment, or more than his ratable share thereof, against all the parties to the instrument for their proportion, whether they were included in said original judgment or not. By the next section, 3626, this remedy lies both for and against the representatives of deceased parties.

It will be observed that the right to make the motion accrues upon the rendition of the judgment against the surety or upon payment by him of the original judgment, or more than his ratable share of said original judgment. The right of recovery in this case depends in part upon the question, whether the failure to prosecute the motion upon the ground of the rendition of the judgment gives the defendant the right to rely upon the statute of limitations from the time said judgment was rendered, against a motion entered and prosecuted against defendant, upon the ground that plaintiff had *paid* the judgment, or whether the statute would begin to run against the latter motion, only from the time of the payment of the judgment. The statutes clearly give the co-surety the

right to the motion upon the payment of the judgment as a distinct and substantive cause of action. And the statute of limitations would only run against such cause of action from the time it accrued, and that time would be when the judgment was paid.

This is the construction placed upon section 3625 of the Code, by Judge Caruthers, in his History of a Law Suit, and it is a sound one; see also, 10 Yer., 521, where it is expressly adjudicated in conformity to this construction.

In this view neither sections 2279, 2281, 2784, nor 2786, being acts of limitations of two and seven years, bars the action in this cause, as these statutes run only when there is a cause of action. 5 Hum., 629; 9 Yer., 57; 3 Yer., 319; 7 Yer., 165.

But it is insisted that the statute of limitations having barred the original debt against defendant, the administrator of the co-surety of plaintiff, it cannot be revived against him by the recovery of a judgmennt against plaintiff, co-surety of his intestate, and having a complete defense to the original cause of action under the statute of limitations, he cannot be made liable to pay the co-surety any part of the debt due to the original creditor, which his co-surety has been compelled to pay.

In the case of *Marshall* v. *Hudson*, 9 Yer., 57, this defense was made, and it was held that the surety was liable, although the administratrix of the principal had succeeded in defeating the recovery of the creditor against her by the plea of the statute of limitations. The court held, that although she had succeeded in

her plea of the statute of limitations against the creditor of her intestate, yet as soon as Marshall had been compelled, as intestate's surety, to pay the debt, he became her creditor and was entitled to judgment against her.

It is by the payment of the debt of the principal that the surety becomes creditor of his principal or his representative by the express provisions of the statutes, and then his cause of action accrues. Code, sections 3625, 3625*a*; 10 Yer., 521.

And in 10 Yer., 521, it is held that the same rule applies as between co-sureties; that when one of the co-sureties has paid the debt he may, within two years from that time, make his motion, or bring his action against the personal representative of the deceased co-surety for contribution; that the act of limitations begins to run against him from the time he paid the judgment, and not from the time the judgment was rendered against him.

So it has been held by successive adjudications of this court:

1. That although the administrator of a principal in a note may defeat the recovery upon the note by the plea of the statute of limitations, yet the exoneration of such administrator does not relieve the sureties of his intestate from liability. *Bank* v. *Campbell*, 7 Yer., 353.

2. That although the administrator of a deceased principal debtor on note may by the statute of limitations defeat the creditor's recovery against him, yet when the surety on such a note is compelled to pay

the debt, such surety then has a cause of action against such administrator for the amount so paid. That this cause of action commences in point of time and is founded upon the payment of the debt by him. *Marshall* v. *Hudson, Adm'r*, 9 Yer., 57.

3. That where one of two co-sureties pays a judgment recovered against him, he may have his motion against his co-surety's executor for contribution, within two years from the time he paid the judgment, although more than two years had elapsed from the time of the rendition of the judgment against him, and as it appears, more than two years from the qualification of the executor of the deceased co-surety had elapsed. The cause of action is the payment of the judgment, and the statute of limitations only begins to run from that time. *Maxey* v. *Carter*, 10 Yer., 521.

In the case of *Goss* v. *Gibson et al.*, complainant filed his bill against his co-sureties for contribution. Complainant and defendant were all co-sureties of one Marshall. In December, 1842, all the defendants were declared bankrupts and discharged from all their debts and liabilities.

In September, 1843, judgments were rendered against the complainant upon claims upon which he and defendants were co-sureties for Marshall, and complainant was compelled to pay them, and then filed his bill for contribution as above stated. Defendants insisted that they were discharged from all liability on said claims by their certificate in bankruptcy. And so they were. But this court held, that at the time of their discharge in bankruptcy the complainant had

no debt or demand against them; and the certificate of discharge in bankruptcy was no protection against complainant's right to recover—8 Hum., 197—that although they were discharged from the debt to the original creditor, when complainant paid that debt as surety, his right of action accrued against them.

In *Kerr* v. *Clark*, Clark offered Smith as a witness, he and Smith being co-sureties on the note sued on. Smith was not sued and was discharged in bankruptcy from all liability for his debts. He was allowed to testify over plaintiff's objection in the circuit court, and verdict and judgment were for defendant, and plaintiff appealed to this court. This court said: "It is true Smith had been discharged in bankruptcy, and as between himself and the holder of the note he was under no responsibility, but should Clark be compelled to pay this debt as surety, he will then have a right of action against Smith for contribution. Clark's right of action would accrue after the discharge in bankruptcy of Smith, and of course would be unaffected by that discharge." 11 Hum., 77.

In these cases the defendants were discharged from the original debts. But the payment of their co-surety gave a cause of action notwithstanding.

Certainly the right to plead the statute of limitations, which we can see would be a good defense to the original obligation, can contribute no higher or better defense against the action of the co-surety, than the actual discharge from such original debt.

The surety's right who has paid the debt of his co-surety to recover, therefore, does not depend upon

the payment of the debt which they were jointly bound to pay at the time the payment was made; but upon the fact of their being co-sureties in the obligation which one has been obliged to pay. And when he has paid it and not before, he has a cause of action. Before judgment or payment one co-surety has no right of action against the other—afterwards he has, by the express terms of the statutes and the repeated adjudications of this court. Up to such event they both stand as to each other upon a plane of perfect equality. Their creditor may sue either or both, at his option. They cannot dictate to him, and if he sues one and obtains satisfaction out of him only, then such surety has his remedy against his co-surety.

In 3 Pars. on Con., 91, it is said: "If a surety pays for his principal, the statute begins to run from his first payment for his principal, but as to his claim on a co-surety for contribution, it does not begin when he begins to pay, but only when his payments amount to more than his share." And again: "The contract upon which the assumpsit is founded, dates *from the time when the relation of co-surety or co-obligor is entered into;* although the cause of action does not arise until the payment. Hence the discharge of one of the joint debtors, (by whatever cause) from his direct liability to the creditor, does not relieve him in law any more than in equity from his obligation to indemnify such of the remaining joint debtors as have borne more than their original proportion of the debt." 1 Pars. on Con., 35–6.

"A party acquires a right to contribution as soon

as he pays more than his share, but not until then; consequently the statute of limitations does not begin to run until then." *Ibid*, 36.

The judgment of the Circuit Judge dismissing plaintiff's action is erroneous and is reversed, and the plaintiff is entitled here to judgment for one-third of the judgment and interest and costs recovered off him.

JOHN L. KERR *et als.*, by next friend, etc., *v.* F. M. WHITE, Ex'r, and THOS. W. WHITE, Trustee, etc.

1. TRUSTEES. *Testamentary. Not required to give bond. When.* Testamentary trustees are not governed by the provisions of the Code, Sec. 1974, *et seq.*, in regard to giving bond, filing inventories, etc.

Code cited: Sections 1974–77.

2. SAME. *Same. Chancery practice.* Before a court of equity will interfere with the execution of a testamentary trust by a trustee, some danger from the misconduct or incapacity of the trustee must be shown, or at least apprehended, with good cause.

FROM SHELBY.

Appeal from the Chancery Court. R. J. MORGAN, Chancellor.

PATTERSON & LOWE, ESTES & JACKSON and R. P. DUNCAN for appellants.

KORTRECHT, CRAFT & SCALES for defendants.

Kerr v. White.

FREEMAN, J. delivered the opinion of the court.

This bill is filed in the name of three infant complainants, John L. Kerr, Kate B. Kerr and Julia W. Kerr, by their step-father and mother as next friend, H. T. Coffee and Julia his wife. They are of tender years, the oldest being eleven years old when the bill was filed, the youngest, since dead, four years. They reside in Memphis with their step-father.

The facts necessary to be stated are, that their grandfather died at his residence in Shelby county, Tennessee, in August, 1870, leaving a will which was duly proven by Frank M. White, the executor appointed by the testator.

By this will the testator, after other devises and bequests, gave to Thos. W. White all the rest and residue of his property, both real and personal, including houses and lots, lands, bonds, notes and stocks of every kind and description, in Georgia, Tennessee and Mississippi, or elsewhere, in trust for the benefit of his three grandchildren, (the complainants) with full power and authority to sell any portion of the same and reinvest in such other property as he may think best, to expend such amounts as may be necessary to educate them well, and on the coming of age or marrying of his grandson, to pay him over and deliver to him one-third of the same—and on the marriage or coming of age of the girls, to deliver one-half their interest to them and to settle on them for life, with remainder to their heirs, in strict settlement, the other half. The executor has not as yet settled up

and paid over the fund in his hands, except about $2,500, but is probably about ready to do so.

The bill states the estate to be large, probably of the value of $250,000, consisting of lands, town property, choses in action and bonds. It seeks relief on two grounds mainly. First, that while it is not known how much of the fund has been received by the trustee, complainants are satisfied that what has been received is sufficient to provide for their education as contemplated in the will, but that White has declined to furnish the means for the education of complainants, and tuition bills are now unpaid and creditors pressing for their payment. To this portion of the bill there is an answer, explaining the reasons for any failure to pay bills, if such had accrued. We need not discuss this point, as the question is not before us on the demurrer which was put into the answer, and it is on this demurrer, with the action of chancellor on the same, the decree was made which we are to review. Suffice it to say, that from the statement in the bill it would seem the children are being educated, but the bills delayed in payment, of which the creditors might complain, but hardly the parties to this suit. However, passing from this: The questions presented by the demurrer are raised on the claim of complainants that the trustee shall give security for performance of his duties as trustee. The bill goes on the theory that White is in default, because he has omitted to enter into bond with security for the faithful discharge of his duties as it is stated, "in the manner prescribed by law," and from the whole bill and

especially the prayer for relief, it is evident this relief is based mainly, if not entirely, on the assumption that this is required by the Code in its provisions for assignees and trustees on this subject. The prayer is, that he shall give bond before this or the county court of Shelby county, conditioned as prescribed by law for the faithful discharge of his duties. In addition it is asked that the trustee be required to make the proper affidavits, returns and settlements as the law requires, and on failure to do all this, it is asked that he be removed from office. All this points unmistakably to the idea that this bill is framed on the assumption that this trustee is bound to perform these requirements of the Code before he can enter on his duties, and that this is the real question intended to be presented as the ground for the relief prayed. We will first examine the case on this assumption and in this aspect of it.

By Section 1974, and sub-sec., and succeeding section of same chapter, it is provided in substance, that any trustee or assignee to whom property exceeding the value of five thousand dollars is conveyed in trust for the benefit of creditors, sureties or other persons, unless by *them* released in writing from doing so, shall give bond for the faithful discharge of his duties imposed upon him by law and by the terms of the deed or assignment. He is also to take and subscribe an oath before the county court clerk, first, to faithfully perform the duties imposed upon him by law and by the deed or assignment; second, that he will make an inventory of the goods, chattels, lands or other

assets contained in the trust deed or assignment, which have or may come into his hands; third, that he will make a full return or cause to be filed in the office of the clerk of the county court, an account of all sales of said effects, and all moneys received or securities taken. The other sections provide for filing the bond and affidavit and its preservation by the clerk, and then for compensation of such trustees. Sec. 1977 provides for the removal of any trustee or asignee who fails to comply with these provisions, and the appointment by the county court of another trustee or receiver, who, on giving the bond and taking the oath, is to execute the trust or assignment.

It is evident from these provisions that they have no reference whatever to such a trust as the one before us—a testamentary trust, where no such duties as are contemplated in the statute are to be performed. The whole tenor of the statute and the repeated language shows it was intended to cover the case of a deed of trust or assignment for the benefit of creditors, sureties or other like cases. If the language was not too clear for doubt and did not show unmistakably the reference of the statute to such "deeds or assignments," to use its words, the title of the chapter would solve any doubt on the subject. It is, "Of trust assignments to secure creditors," thus giving a clear and unquestioned designation of its objects, and the matter of the statute in all its provisions corresponds with the purpose thus expressed. For instance, the bond is to be given for "the performance of the duties imposed by law and the terms of the deed of

assignament;" the oath is to the same effect and in same language. The return he is to make to the county court is "of all sales of said effects and all moneys received or securities taken." This is all too clear for doubt on reading the statute and giving a fair construction to its terms, even without the title, which clearly shows what the subsequent provisions were intended to embrace. We therefore hold, that the chancellor erred in holding that this trustee was bound by law, before entering upon his trust, to execute a bond for performance of his duties, unless exempted therefrom by the testator, or that he was bound under the statutes of our State to give such bond, either as to property in the State or out of it.

This probably in strictness disposes of all the questions fairly before us on this appeal which is by both parties, the one claiming that no bond could be required of him or was required by law, the other party claiming a bond for the property beyond the jurisdiction of the court.

It may not be improper, however, to remark that as to the facts stated in the bill which are now pressed in argument in favor of the relief sought on general grounds of equitable interference to protect trust property, that there is nothing in the bill to sustain such action in this case. No breach of trust is charged, no danger to it from any misconduct or unfitness of the trustee is even suggested, or that the fund is in the slightest danger from his mismanagement; on the contrary, he is admitted to be a man against whom no objection can be made personally, and even that

he is a proper and suitable person to execute the trust. All that is said on the subject is, that while he is solvent he is not worth as much as the trust fund, and therefore it is deemed hazardous that he shall have charge of it without security. Before a court of equity will interfere with the execution of a testamentary trust by a trustee, especially of this character, some danger from the misconduct or incapacity of the trustee must be shown, or at least be apprehended with good cause. See Perry on Trusts, Sec. 275–6.

The party was known to the testator, his circumstances no doubt familiar to him, no change is shown in them since his selection. He has been trusted by the giver of this bounty to complainants. He is charged with considerable discretion as to the management of the property, showing a personal trust and confidence reposed in him. There has been no violation of this confidence, none is suggested or charged as probable. It would be contrary to every sound principle to say, that under such circumstances the trustee should have the burden imposed on him of giving security for performance of his duties, when the testator had confided his property to his care without such a burden. This probably would, in many cases, defeat the purpose of the testator by deterring the party appointed from undertaking the duties imposed on such terms, and involves a reflection in advance on his faithful performance of his duties, contrary to the spirit and purpose of his appointment by the testator. These reasons would be sufficient to re-

pel such a claim, if no authority sustained the view; but the contrary is the well-established rule.

As to the other matter of the bill, that the trustee should be required to make settlements or file an inventory, and administer the trust under the direction of a court of equity, at least so far as the estate is in Tennessee, we express no opinion either way, as the question is not before us on this appeal.

A decree will be drawn in accord with this opinion and the case remanded to be proceeded in on the answer.

Costs will be paid in this court by Coffee, the next friend.

Mary A. McCallum v. S. M. Jobe.

1. Bills and Notes. *Principal and surety. Evidence. Parol, admissible to show the meaning of an indorsement.* The defendant, Jobe, indorsed the note in controversy to W. D. McCallum, who transferred the same to the plaintiff, Mary A. At the time the note was purchased by W. D. McCallum, the defendant, Jobe, had a mortgage upon valuable real estate to secure it. Upon the same property W. D. McCallum had foreclosed a subsequent mortgage of his own, and became the purchaser himself, and was in the possession under a deed from the trustees. It is alleged as error, that the court below, over the objections of the plaintiff, admitted the testimony of the defendant to the effect that when he sold and endorsed the note to W. D. McCallum, there was a distinct understanding between them, that McCallum was buying to relieve his property of this incumbrance upon it, and that

the defendant was in no manner to be held liable, and that McCallum was to be substituted to all of Jobe's rights, under the prior mortgage, which was a full indemnity and consideration to McCallum for his outlay for the note. *Held*, in such a case the testimony was properly admitted.

2. SAME. *Same. Mortgage. Debt merged by operation of law.* By operation of law the debt was merged and extinguished, and there can be no recovery on the note. In such a case the sale of the note carried the security with it, and no paper title was necessary to invest the purchaser with all the benefits of the mortgage.

Cases cited: Cleveland v. Martin, 2 Head, 131; Gibson v. Martin, 7 Hum., 127; Graham v. McCampbell, Meigs' R., 52; Napier v. Elam, 6 Yer., 116; Graves v. McFarlane, 2 Col., 167; Hepburn v. Kerr & Davidson, 9 Hum., 726.

FROM SHELBY.

Appeal from the Circuit Court. C. W. HEISKELL, Judge.

WILSON & BEARD for complainant.

JARNAGIN for defendant.

SNEED, J., delivered the opinion of the court.

The action is brought upon a promissory note for five thousand dollars, executed by C. Pfanuensteihl to the defendant, S. M. Jobe, on the 4th August, 1866, due at twelve months after date, and indorsed by Jobe to W. D. McCallum, February 21, 1870, and by him to the plaintiff. At the time of the purchase of the note by W. D. McCallum, the defendant Jobe had a mortgage upon valuable real estate in the city of Memphis to secure it. Upon the same property W. D. McCallum had foreclosed a subsequent mortgage of his own, had become the purchaser himself and was in

possession under a deed from the trustee. The verdict and judgment below were for the defendant, and to reverse that judgment the plaintiff has appealed in error.

It was insisted upon the trial below, that the liability of the defendant as endorser, had not been fixed by due and lawful demand and notice, and that by the laches of the plaintiff in this respect the defendant had been discharged. In the view we have taken of the case, this question may well be ignored and pretermitted in the discussion. We may concede, for all the purposes of this decision, that the demand and notice were proper, regular and lawful, but where it is so plainly manifest upon the merits of the cause, that the exact legal rights of the parties have been attained and the strict law of the case administered by the verdict, we are forbidden to reverse the judgment, unless in some manner the merits of the cause have been affected by the error alleged. It is alleged as error, that the court below, over the objections of the plaintiff, admitted the testimony of the defendant to the effect that when he sold and indorsed the note to W. D. McCallum, there was a distinct understanding between them that McCallum was buying to relieve his property of this incumbrance upon it, and that the defendant was in no manner to be held liable as indorser, but that the transaction was understood by both parties as a substitution of McCallum to all of Jobe's rights under his prior mortgage, which as a matter of fact was a full and ample indemnity and consideration to McCallum for his outlay for the note.

This fact being established, it is most clear that it would have been a great fraud and wrong upon the defendant to have enforced against him the collection of the note, when McCallum had already been fully reimbursed by the rescue of his estate from the valid incumbrance the defendant held upon it, and which passed to McCallum by the transfer of the note. We hold that in such a case the testimony was competent and was properly admitted.

There is a well-established exception to the rule, that parol evidence is inadmissible to alter, vary or impair the legal effect of a written contract of endorsement such as this, which we fully recognize. As between the original parties to commercial paper, or others having no superior equities, parol evidence has always been admitted to show fraud, want or failure of consideration, or that the enforcement of the contract according to its legal effect, as gathered alone from the writing, would operate as a fraud upon the defendant. And we apprehend that nothing can be found in our decisions that, upon careful scrutiny, conflicts with this well-established exception, where a defendant has sought to bring himself within the exception. The rule is thus strongly stated in the text books: "Notwithstanding the general rule that bills and notes cannot be contradicted in their legal effect by oral evidence, it is well-settled that they may, between the original parties, be impeached for illegality, for failure of consideration, for fraud, for want of consideration, or by showing a subsequent agreement varying the original contract, or waiving a portion of

it." Edw. on Bills, 141. "While the legal effect of an indorsement may not in general be changed by parol proof, the rule does not exclude proof of fraud or want or failure of consideration." *Id.*, 295, 296, 297.

Parol evidence may undoubtedly be given of the circumstances under which a note or its indorsement is made, in order to show a want or failure of consideration, or illegality in the transaction, or to present the defense of a fraudulent appropriation of the note to a purpose to which it was not intended, or to establish a contemporaneous agreement as to the mode of payment which has been executed in satisfaction of the debt. Chitty on Bills, 69, 142; *Duncan, Sherman & Co.* v. *Gilbert*, 5 Dutcher, 521; *Oliver* v. *Phelps*, Spencer, 180; 1 Zab., 597; *Chaddock* v. *Vanness*, 35 N. J., 517; 10 Am. Rep., 258. These rules apply as between the immediate parties, or subsequent parties without superior equities. The language of the rule, says a late text writer, implies its limitation, for it does not extend to exclude evidence offered to show want or failure of consideration, or to impeach the original or present validity of the indorsement on the ground of fraud. Facts may always be proven by parol that tend to show that the enforcement of defendant's liability would operate as a fraud. 1 Danl. Neg. Inst., sections 720, 722. A fine illustration of the exception is found in the case of *Hill* v. *Ely*, 5 Serg. & Rawl., 366, where the holder handed Hill the notes, saying, "Hill, you must endorse the notes." The defendant replied, "that is not our understanding." To which the plaintiff rejoined, "they are made pay-

able to you, how will you convey them? You must indorse them that I may collect them." The defendant then said, "I will indorse them, but remember that I am not to be responsible for their payment." The court said the evidence went to prove a direct fraud in obtaining the indorsements, or their perversion to a use never intended—a fraudulent purpose. And the testimony was held properly admitted. But aside from this question, there are ample grounds upon which this verdict may be sustained, even if we concede the testimony of the defendant to have been improperly admitted, which we do not. When McCallum bought his note, the mortgage of the defendant, Jobe, for its security was an unquestionable incumbrance upon the land, and the mortgage is conceded to have been abundant security for its payment, while the mortgagor and maker of the note was known to all parties to be utterly insolvent. Now, whatever may have been the effect of Jobe's indorsement in imposing upon him a *prima facie* technical liability upon the note, it is manifest from the testimony of McCallum himself, and from all the surrounding circumstances, that McCallum's paramount object in buying the note was to discharge the incumbrance and relieve his property. And we are equally well satisfied that Jobe, having full knowledge of the insolvency of the maker of the note, and having a full and perfect security in the mortgage for the payment of the whole amount of the note and interest, would not have disposed of it as he did for less than its value, losing several years of interest upon it, if he had in-

tended that, in addition to his investing McCallum with all his interest in the mortgage, „he was also to be held personally bound on the note. The facts of the whole negotiation are most unimpeachable witnesses for him and they acquit him of this great folly, and his own testimony to that effect, in our judgment, unquestionably interprets the true intention of the parties in the transaction. We hold that there is enough in the case, without his testimony, to show that it cannot be possible that it was the intention of the parties that he should be bound for the payment of the note.

It is developed in the proof, that Jobe's remedy under the mortgage was temporarily embarrassed by an injunction bill then pending to restrain the collection of certain separate interest notes alleged to be usurious, and the true solution of his conduct is in the fact that this transaction with McCallum was the shortest and best way for his own extrication, without the greater sacrifice of a protracted delay in the foreclosure of his mortgage. What, then, is the legal effect of this transaction? It seems to us that the authorities are very clear to the effect that by operation of law the debt was extinguished and that there can be no recovery on the note. In such a case the sale of the note carried the security with it, and no paper title was necessary to invest the purchaser with all the benefits of the mortgage. *Cleveland* v. *Martin*, 2 Head, 131. It would certainly be a monstrous anomaly of wrong to permit McCallum to be first reimbursed for his whole outlay by a discharge

of the incumbrance upon his land and then to be paid the same amount by compelling Jobe to pay the note, the former being doubly indemnified, and the latter losing his entire debt. The law scorns an alliance with injustice and oppression, and perhaps no case can be produced which so well illustrates the obvious justice and soundness of the principle, that in such a transaction the debt is merged and extinguished by operation of law.

In support of this view we cite numerous authorities bearing upon it in divers aspects, and which we hold to be decisive of the case: 1 Hil. on Mort., 236, 251, 375, 540, 543, 504; Perry on Trusts, 318, 351; 7 Hum., 127; 5 Cow., 202; 4 B. Mon., 529; 34 Iowa, 392; Meigs' R., 52; 4 Johns, 43; 15 Mass., 485; 19 Johns, 325; 2 Wash. R. P., 500; 6 Allen, 79; 2 Johns Ch., 128; 10 Paige, 255; 6 Yer., 116; 8 Mass., 493; 22 Pick., 394; 2 Col., 167; 9 Hum., 726; 20 Penn., 284; 14 Pick., 104; 3 Johns Ch., 53; 6 Johns Ch., 417; 1 Allen R., 242; 18 Ves., 384; 20 Mo., 482; 20 Mich., 9; 6 Pick., 492; 3 Cush., 554; 2 Barb. Ch., 618; 51 Ill., 331; 51 N. Y., 333; 10 Paige, 595.

Affirm the judgment.

L. Levering *et al.* v. L. C. Norvell *et al.*

and

M. B. Brady & Co. v. L. C. Norvell *et al.*

1. Fraudulent Conveyance. *Voluntary conveyance of property in fraud of creditors.* Norvell, Boone & Co., of Memphis, obtained credit from Brady & Co., in New Orleans, through one of their members (McKeon), upon the faith of his individual estate, which he promised should remain in his own name, and be subject to his debts; that soon afterwards McKean made a voluntary conveyance of his property, when his firm was in doubtful circumstances, without warning Brady & Co., who continued the credit previously obtained. *Held*, such a conveyance is evidence of fraud, in fact, and the registration of the deed does not alter the case. The property so conveyed will be liable to the satisfaction of debts due such creditor, though contracted subsequent to the conveyance. A debtor has no right to convey all of his tangible property and leave his creditors to take their chances of realizing their debts from assets, consisting of bills and accounts payable, where the proof fails to show that such assets were available to creditors. As the deed is void for fraud, in fact, all the creditors will be allowed to share the proceeds.

Cases cited: White v. Bettis & Capps, MS.; Martin v. Oliver, 9 Hum.; Churchill v. Well, 7 Col., 364.

2. Same. *Same. Payment of debts. Does not rebut evidence of fraud. When.* Where a debtor makes a voluntary conveyance and afterwards pays a large part of his liabilities, this does not rebut the evidence of fraud.

FROM SHELBY.

Appeal from the Chancery Court. R. J. Morgan, Chancellor.

No record can be found.

McFARLAND, J., delivered the opinion of the court.

The firm of Norvell, Boone & Co. was composed of L. C. Norvell, O. C. Boone and Wm. McKeon, and was engaged in business of cotton factors and commission merchants at Memphis. In the early part of the year 1860, they were largely indebted; these debts were principally drafts or bills drawn by them on other parties and accepted in anticipation of cotton to be shipped by them, and consequently fluctuated in amount from time to time. On the 30th of March, 1860, Wm. McKeon, one of the partners, made a voluntary conveyance for the benefit of his wife and children, of a number of separate pieces of real estate in and near Memphis, some slaves and personal property. The firm was dissolved in less than a year afterwards, leaving a large amount of indebtedness unprovided for. The present bills were filed to set aside the deed of Wm. McKeon, and subject the property therein conveyed to the payment of the debts. The complainants in one of the bills are M. B. Brady & Co., who were merchants and factors at New Orleans; they claim a debt of from $12,000 to $14,000, with interest, a balance of a much larger debt. They were creditors of Norvell, Boone & Co. at the time the deed in question was made. The debts of the other parties, as well as those who came in by petition, were contracted afterwards.

The debts of Norvell, Boone & Co. on the 30th March, 1860, the date of McKeon's deed, amounted, according to the proof, to $40,000, and it is very

probable they were indebted to a much larger sum. The debt to Brady & Co. at that date was $19,870.46, between which time and the 8th of June, Brady & Co. paid and accepted further drafts from Norvell, Boone & Co. to the amount of over $35,000. On the latter day a settlement was made between the parties, and after allowing to Norvell, Boone & Co. credits for a number of payments made subsequent to the 30th of March, 1860, they executed to Brady & Co. their note for the balance of $30,317.73, with an agreement in writing, signed by Brady, to correct any error in the account. The claim of Brady is for a balance on this note.

The question is, whether the deed of McKeon for the use of his wife and children, was in fraud of Brady & Co.

It appears that McKeon was considered the solvent man of his firm, on account principally of the real estate he owned in and about Memphis, worth at the time from $60,000 to $100,000. The property of the other members of the firm was not large. Brady, who was a brother-in-law of McKeon, gave credit to the firm alone on the latter's account. The record contains a letter from McKeon to Brady, dated 16th February, 1860, which shows that it was in reply to a letter of the 8th from Brady to McKeon, in which Brady had cautioned McKeon against his partners, Norvell and Boone, expressing the opinion that they were wanting in integrity, and also warning McKeon that his house was in danger. In reply, McKeon expresses his gratitude not only for the warning, but

also for the previous accommodations extended to his firm, admitting the recent acceptance by Brady & Co. of their drafts for $23,000, which were then unpaid, which sums, however, he promises soon to meet by the shipment of cotton, but asks a renewal of a debt of $10,500, which his firm had assumed to Brady & Co. on account of the individual debts of himself and Boone, which latter sum he said they could not then meet. He further says that since receiving Brady's letter he had been looking closely into the business of his house and found it in a very healthy condition, and that by the 1st of April they would be very easy. He further assures Brady that his property was all paid for and in his own name and *should remain so during his life*, and be responsible for his debts. After this, from the 29th February, Brady & Co. accepted from Norvell, Boone & Co. to a very large amount; the greater part of which, however, Norvell, Boone & Co. afterwards paid or provided for.

It is argued in behalf of the defendants that nearly if not quite the entire debt of Brady & Co., in existence at the date of the deed in question, was afterwards paid, and that all or nearly all of the debt evidenced by the note of the 8th June, was contracted after the date and registration of the conveyance and with actual knowledge of its existence. It appears that in the account of Brady & Co., upon which the settlement of the 8th of June was made, there were charges for four bills or drafts drawn by Norvell, Boone & Co. and accepted by Brady & Co.; two payable in October and two payable in November, 1860;

all amounting, with commissions for acceptance, to $27,675.36. It is argued that if Norvell, Boone & Co was indebted to Brady & Co. at all, it was only for those acceptances; that the balance of the account making up the note for $30,717.13, was erroneous, on account of commissions improperly charged, and other errors, and that the debt for these acceptances was at most but a subsequent debt, contracted with notice in face of the deed in question.

There is some uncertainty as to when these four bills were accepted by Brady. Boone testifies that they were accepted on the 8th June, the day of the settlement, and made for Brady's accommodation and to enable him to raise money upon them; but he fully disproves this in the subsequent part of his testimony.

It appears that Norvell, Boone & Co. purchased twenty-six slaves in South Carolina and paid for them in part with two of the above acceptances of Brady & Co., amounting to $18,000.00, and the balance with the acceptances of another firm, Richard Nugent & Co. They resold the slaves on the 14th May, 1860. Boone proves that he thinks they had them on hand about two months. This would fix the date of the purchase of the slaves as early as the 14th March, which was before the deed in question was made; at any rate, it appears from the books of Norvell, Boone & Co., that two of the four acceptances referred to were used before the 3d of May, in paying for the slaves. The other two drafts, from their numbers, appear to have been drawn before or at the same time; so it

is clear that these drafts were accepted by Brady & Co. as early as the 3d of May, but whether before the 30th of March or not is not clear. But if they were accepted after the 30th of March, we are of the opinion that Brady & Co. accepted without actual knowledge in fact of the deed in question. It is true Shanks, who was the agent of Brady & Co. in Memphis, proves that he accidently discovered the deed on the register's books a few days after its execution, though he thinks not as early as the 5th of April; his best recollection is he notified Brady & Co. of it very promptly. Brady, who was the active member of his firm at New Orleans, thinks he first learned of it on his visit to Memphis, which was about the 8th of June. The circumstances satisfy us that he did not in fact have knowledge of the deed when he made the four last acceptances above referred to. It fully appears that he was uneasy about the debt of Norvell, Boone & Co.; he caused Shanks to urge upon said firm the settlement of the debt, and for the same purpose sent up his book-keeper about the first of April, and finally came himself about the 8th of June. Outside of these four acceptances his debt was then small—not exceeding $3,000. It is not probable that he would, with a knowledge of the deed, then have increased the debt to the extent of $27,000, with no security but the note of the firm, especially as he had previously trusted the firm alone upon the faith of McKeon's individual property.

It is said, however, that the registration of the deed is conclusive notice that the creditors are pre-

sumed not to give credit upon the faith of the property conveyed in the deed. Such language is used in the case of *White* v. *Bettis & Capps*, MS., and *Martin* v. *Oliver*, 9 Hum., but this, we think, does not apply in a case like this where the creditor resided out of the State, had previously extended credit to the firm upon his faith in the property of the one member, and had been misled by the positive assurances so shortly before given by the latter that all his property was in his own name and should so remain during life and subject to his debts. *Churchill* v. *Welle*, 7 Col., 364. McKeon knew that Brady had no faith in the solvency of Norvell, Boone & Co. as a firm and trusted him alone; with this knowledge he gives him the positive assurance that his individual property is in his own name and should so remain, and yet within a very short time afterwards he makes this deed conveying, for the benefit of his wife and children, all his individual property real and personal, including eight different pieces of real estate, his slaves, his horse, rockaway, drays, cows, household and kitchen furniture, in fact all the individual property he owned, being the property on which Brady relied, worth from $60,000 to $100,000, and this while a large portion of Brady's debts remain unpaid; and not only this, he allows Brady to continue his acceptances in behalf of his firm, without calling his attention to the sudden change of purpose on his part in relation to his own property, notwithstanding they were brothers-in-law and on intimate terms. It appears that McKeon did not inform Brady of his conveyance. It appears

that one time during the spring of 1860, though the precise date is not shown, McKeon telegraphed to Brady begging him to accept their drafts or Norvell, Boone & Co. would fail, and that Brady did so, and it is admitted but for these acceptances the firm would then have failed; what drafts these were, does not appear.

Under these circumstances we hold that McKeon's voluntary conveyance is evidence of fraud in fact, and that the registration of the deed does not alter the case. Brady relied upon McKeon's word as to his purpose not to convey his property. We are satisfied that McKeon had himself become alarmed in regard to his firm, probably in fact on account of the warning of Brady, and he made this conveyance with a view to save his individual property in the event the firm failed.

It is not insisted that McKeon retained at the time of making this deed any individual property, unless it be some swamp or wild lands in Mississippi. The answer admits that the deed conveyed all or nearly all of his real estate. The grants for these Mississippi lands are afterwards found and filed as evidence, but there is no satisfactory proof that McKean still remained the owner thereof; but it is earnestly argued that the firm of Norvell, Boone & Co. was solvent and had ample assets to pay its debts. The nominal value of the assets was about $90,000, consisting principally in bills and accounts payable, but we think the proof does not show that these assets were available to creditors. It does not appear

that any considerable amount was afterwards realized; the payments subsequently made on the debts were made principally by creating new debts—assets of this character on paper are very delusive. They are not available to crediters; a debtor has no right to make a voluntary conveyance of all of his tangible property and leave his creditors to take their chances of realizing their debts from assets of this character. The twenty-six slaves, if on hand at the date of the conveyance, are not to be regarded as assets, for they were paid for with the acceptances of Brady & Co. and others, not included in the estimate of the indebtedness of the firm.

The fact that a large part of these debts were subsequently paid does not rebut the evidence of the fraud. Of course where a debtor, subsequent to his voluntary deed, pays all his debts, this rebuts the evidence of a fraudulent purpose alone from the voluntary conveyance. We have no doubt that McKeon intended to allow all the resources of his firm to go in payment of the debts; if they were thus satisfied it was all well, but if not, his purpose was to save his individual estate from the creditors. The payments made to Brady after the 8th June, as well as some payments made to other parties, were made by Norvell, Boone & Co. shipping goods to them to be sold or credited on the debts. These goods were bought in the summer and fall of 1866, in the northern and eastern cities, and the debts created by these purchases are the debts claimed by the complainants in the first named case of Levering & Co. and others, who came

in by petition. As we hold the deed void as to Brady & Co. for fraud in fact, all the creditors will be allowed to share the proceeds.

The decree of the chancellor will be reversed, the deed in question declared void as to the creditors, and the cause referred to the clerk for an account o the debts.

E. W. JOHNSON *v.* A. G. HUNTER.

PLEADING AND PRACTICE. *Quia tam actions. Bonds. Pauper's oath.* *Quia tam* actions must be prosecuted with bond and security. The right to sue in *forma pauperis* is a personal right, not a privilege to be exercised in a representative capacity.

Cases cited: Green v. Harrison, 3 Sneed, 131; McCoy v. Broderick, 3 Sneed, 203.

Code cited: Sections 1305, 3192.

FROM DYER.

Appeal from the Circuit Court. S. W. COCHRAN, Judge, *pro tem.*

T. M. ANDREWS for complainant.

LATTA & MARSHALL for defendant.

Johnson v. Hunter.

DEADERICK, C. J., delivered the opinion of the Court.

This is a *quia tam* action for obstructing a navigable stream by building a dam across it.

The plaintiff instituted the suit in the circuit court of Dyer county, by taking the *pauper's* oath, and on motion the suit was dismissed, upon the ground that he could not prosecute such a suit without giving bond with security. Plaintiff has appealed to this court, having given bond and security for his appeal.

The argument is made, that the right to sue *in forma pauperis* is a personal right strictly, and that it is a privilege not to be exercised in any representative capacity; 3 Sneed, 131; *Ibid*, 203; and that the suit in this case is brought in behalf of the State as well as in behalf of plaintiff.

It is true, under section 1305 of the Code, one-half of any recovery which may be had, goes to the State, yet the suit is prosecuted by plaintiff alone, the State being no party thereto.

Section 3192 of the Code, authorizes any person, on taking a prescribed oath, to prosecute an action without giving security, in all cases except for false imprisonment, malicious prosecution and slander.

In addition to these excepted cases, by reason of the statutory requirements in actions of replevin and in forcible entry and detainer, in certain contingencies it has been held by this court bonds and security are required.

But the statutes and oath to be taken in prosecutions without giving security, seem to contemplate a

provision for the purpose of affording poor persons a means for enforcing their personal rights or redressing some wrong or injury personal to themselves.

The plaintiff in such a suit must swear that *he* is justly entitled to the redress sought. Whereas the action brought in this case is for the use of the State in part at least, and the object sought in addition to the recovery of the penalty is to punish the defendant for obstructing a public highway. So to the extent of one-half of the penalty to be recovered and in punishment of the offender, the plaintiff is not personally interested more than any other citizen.

We are of opinion, therefore, that the statutes allowing suit to be brought without security, were enacted to give poor persons a right to redress their personal and individual wrongs and to enforce such rights of a personal nature pertaining to themselves as individuals, as might be withheld.

The judgment of the circuit court was correct and will be affirmed.

MEMPHIS & CHARLESTON RAILROAD CO., in error, v. HOLLOWAY & TATUM.

1. RAILROADS. *Common carriers. Liability for freight lost. Connecting lines. Privity. Burden of proof. Evidence.* The last of a series of connecting lines over which freight is transported, is liable for loss or damage, subject to the limitations stipulated for in the contract of shipment with the first line, unless it appears that the loss did not occur on the road sued. The burden is upon said road, to show that the loss did not occur on its line.

   Cases cited: E. T. & Va. R. R. Co. v. Rogers, 6 Heis., 143; W. & A. R. R. Co. v. McElwee, 6 Heis., 208; Fustenheim v. M. & C. R. R. Co., MS.

2. SAME. *Same.* A stipulation that the claim for loss must be made at the time the goods are delivered, will not protect the company, where the claim is made in a reasonable time after the loss is ascertained.

FROM FAYETTE.

Appeal from the Circuit Court. T. J. FLIPPIN, Judge.

HUMES & POSTON for complainant.

W. A. MILLIKEN for defendants.

McFARLAND, J., delivered the opinion of the court.

This suit was commenced by Holloway & Tatum against the Memphis & Charleston Railroad Co. before a justice of the peace; upon appeal to the circuit court the cause was by consent submitted to the judge;

a jury being waived, judgment was rendered for the plaintiffs, and the defendant has appealed.

The case is this: Holloway & Tatum purchased of a firm in Cincinnati a bill of goods, which were properly packed in boxes or cases, directed to the plaintiffs at Somerville, Tennessee, and delivered to the Louisville, Cincinnati & Lexington R. R. Co., which company gave a receipt specifying that the goods were "to be transported and delivered in like good order to Louisville & Nashville Railroad Co. at Louisville, subject to certain conditions noted." One of the conditions is, that the liability of said company shall terminate, (except as to guaranty of rates of freight) upon the delivery of the goods to the next line of transportation.

The boxes or packages passed in due time over the intermediate lines and came to the possession of the Memphis & Charleston Railroad at Grand Junction, and from thence were carried by said road to Somerville and there delivered to the plaintiffs, who at the time made no objection, paying the freight in full, but upon opening the boxes they discovered that part of the goods were missing; they thereupon wrote to the firm of whom they purchased the goods, to ascertain if the missing goods were certainly packed in the boxes; they were informed that the goods were certainly packed. The reply to their letter was delayed some four weeks, and they thereupon, within six weeks from the receipt of the boxes, notified the M. & C. R. R. Co. of the loss and made demand for payment, which being refused, this action was brought. It was

admitted "that the goods were lost somewhere between Cincinnati and Somerville, but where is not known." Upon these facts, are the plaintiffs entitled to recover?

It is argued that no action can be maintained against the defendant, because there is no privity of contract between plaintiffs and the defendant; that the contract of shipment was alone with the first road, and the suit alone could be against that company. We have held that where goods are shipped to a party beyond the terminus of the first road, the first carrier is still responsible for the delivery of the goods at their destination, unless this liability is limited by special contract. *E. T. & Va. R. R. Co.* v. *Rogers & Hartsell*, 6 Heis., 143; *W. & A. R. R.* v. *McElwee*, 6 Heis., 208. But it would not necessarily follow from this, that the owner of the goods might not also maintain an action against a connecting carrier, if he could show that the goods came to his possession and were lost by his neglect. The case of *Fustenheim* v. *M. & C. R. R. Co.*, decided by this court at the April term, 1872, is relied upon, but is not authority for the position contended for. In that case, a passenger purchased a through coupon ticket from New York to Memphis and received a check for his baggage, to be delivered at Memphis; his baggage was delivered at Memphis, but had been broken open and robbed, as was admitted, *while on the first line of railroad.* It was held there was no such privity between the party as to hold the last line of road liable for a loss admitted to have occurred by the fault of the first line of road. But there is no intimation that an ac-

tion might not have been maintained against the last company for any default upon its passage. We hold that upon the delivery of the goods to the M. & C. R. R. Co., it became liable as a common carrier, subject at most only to the limitation stipulated for in its behalf by the first company; some of the stipulations contained in the receipt are in behalf of the first road and connecting lines. The only difficulty we see in the way of recovery, is as to whom the *onus* of proof is upon in regard to where the loss occurred. It is admitted that it is not known where the loss occurred—whether before or after the goods came to the possession of the M. & C. R. R. Co. It is argued that as it is not known that the loss occurred by the default of the defendants, there can be no recovery. This would certainly be the general principle as to other transactions.

It is admitted, however, that the goods were lost in transportation—some one of the connecting lines is responsible for the loss. It is impossible for the plaintiffs to show where the loss of the goods occurred. The cases were all delivered, but one had been opened and part of the goods taken out. If the action had been brought against either of the other carriers, the same difficulty would exist. They could show that the cases were delivered to the M. & C. R. R. Co. In view of the fact that railroad companies have these matters entirely in their control; that it is almost impossible for the owner to get the information which the companies may get in regard to the loss of goods, we think the shipper or owner shall not lose the

goods because of his inability to show where the loss occurred; and as the defendant admits the receipt of the cases without objection from the other companies, we hold it liable. Upon grounds of public policy it is better to put upon the carrier the duty of tracing up the loss and fixing it upon the party first liable, than to put the duty upon the owner.

It is next objected that the receipt contains a stipulation, that claims for loss or damage must be made at the time of the delivery of the goods to the consignee, and the claim was not made in this case for near six weeks. The damage or loss was of a nature not to be definitely known until the boxes were opened, and even then the plaintiffs did not know that the goods had been actually packed, and could not certainly know the extent of the loss; the notice was given in a reasonable time after the facts were known, and this we hold to be sufficient.

Affirm the judgment.

S. H. P. MISKELLY v. W. J. PITTS.

1. DEED. *Construed to merely retain a lien or mortgage. When.* A deed of conveyance containing the following clause: "Nevertheless, this deed of conveyance is null and void and of no effect until all the purchase money is paid, then of full force and effect," is construed to retain merely a lien or mortgage to secure the unpaid purchase money; a non-compliance with the conditions does not avoid it absolutely.

2. EQUITY. *To have relief in, upon an allegation of want of title or breach of covenant of seizin. What requisite. Actions.* A party can have no relief in equity for the alleged breach of the covenant of seizin, or upon an allegation of want of title, no fraud or insolvency being charged, unless a clause in the deed changes its character, from an executed to an executory contract.

Cases cited: Barnett v. Clark, 5 Sneed, 435; Caruthers v. McBurney, 8 Sneed, 593; Law v. Mannering, 8 Yer., 435.

FROM LAUDERDALE.

Appeal from the Chancery Court. H. J. LIVINGSTON, Chancellor.

STEELE, MARLEY & STEELE for complainant.

LYNN, OLDHAM & CONNOR for defendant.

MCFARLAND, J., delivered the opinion of the court.

The original bill is to enforce a vendor's lien for a balance of purchase money due upon a tract of land sold by the complainant to the defendant. At the date of the sale the complainant executed and delivered to the defendant a deed for the tract of land, reciting in the first part the payment in full of the

purchase money, containing covenants of seizin and warranty and against encumbrances. Following this, however, is the following clause: "Nevertheless, this deed of conveyance is null and void and of no effect until all the purchase money is paid, then of full force and effect."

The bill shows that a balance of the purchase money remained unpaid, and claims a vendor's lien, which he asks to have enforced. The defendant filed an answer admitting the allegations of the bill, setting up, however, one additional payment, and by way of cross-bill charges that the condition set forth in the deed not having been complied with, no title had ever vested in the defendant. The cross-bill then charges that "complainant has no title to said land and never had any," and sets forth the fact that defendant had made valuable improvements on the land. The cross-bill prays that the original complainant be compelled to dreraign a perfect title to the land, and upon his failure to do so that the contract be rescinded, with an account of purchase money paid and improvements. The chancellor sustained a demurrer to the cross-bill and gave relief upon the original bill. The defendant has appealed.

It appearing from the admissions of the cross-bill, that the complainant therein is in possession of the land under the deed, with covenants of general warranty and seizin, he can have no relief in equity for the alleged breach of the covenants of seizin, or upon an allegation of want of title, no fraud or insolvency being charged, unless the peculiar clause in the deed

we have referred to changes its character from an executed to an executory contract. See *Barnett* v. *Clark*, 5 Sneed, 435.

It is argued, however, that the clause in question prevents the deed taking effect or vesting the title and converts it into an executory contract, and therefore the vendee may refuse to perfect the purchase until the vendor deraigns a perfect title. A condition in a title bond similar to the condition in this deed, has been held a condition for the benefit of the vendor, which he might waive and which the vendee could not take advantage of. *Caruthers* v. *McBurney*, 3 Sneed, 590; *Law* v. *Mannering*, 8 Yer., 435.

There is a still stronger reason for applying the same reason to a case of a deed, and in a case like this where a large part of the purchase money has been paid, it is not probable that a court, even at the instance of the vendor, would enforce this condition to the extent of declaring the entire contract void, but would rather construe this clause as retaining a lien or mortgage to secure the unpaid purchase money. At all events, this is the extent of the relief claimed by the complainant, and to this relief we think he is undoubtedly entitled.

Decree affirmed with costs.

The State v. Green Chairs and Albert M. McNeal.

Criminal Law. *Previous opinion of grand juror. Does not disqualify.* The foreman of the grand jury that found the indictment in this case was one of the committing magistrates; such fact was pleaded in abatement to the indictment, urging the incompetency of the grand jury, upon the ground that he had prejudged the case. The court say: "We do not understand that our laws require that the grand jurors shall be free from any previous opinion, as to the guilt of the accused."

Code cited: Sections 4992, 4002–4002a, 4003, 4004, 5085.

FROM HARDEMAN.

Appeal from the Circuit Court. T. J. Flippin, Judge.

Attorney-General Heiskell for the State.

Word & McNeal for defendants.

McFarland, J., delivered the opinion of the court.

The defendants to this indictment for larceny pleaded in abatement that the foreman of the grand jury that found the indictment, was not a competent and qualified grand juror, because he was one of the magistrates who heard the case upon a preliminary examination, and committed the defendants to answer the charge, and that he had therefore prejudged the case. Upon demurrer this plea was held good and the defendants

discharged. The attorney-general, on behalf of the State, has appealed.

It has been frequently held in this State, that it may be shown by plea in abatement, that grand jurors were not competent, as that they were not freeholders or householders, (see cases cited in King's Dig., 4992,) but we do not understand that our laws require that the grand jurors shall be free from any previous opinion as to the guilt of the accused. "Every male citizen who is a freeholder or householder and twenty-one years of age, is legally qualified to act as a grand or petit juror, if not otherwise incompetent under the *express* provisions of this Code." See Code, sections 4002–4002*a*. This is the language of the statute. Is there then any *express* provisions of the Code rendering a grand jury incompetent on account of a preconceived opinion? Sections 4003 and 4004 may, for the present purposes, be taken as applying to grand or petit jusors, but the qualifications there referred to do not apply to this case. Section 5085 is the only express provision other than the above, disqualifying grand jurors, and that is in case the grand juror is himself charged with an indictable offense, or is prosecutor, or the offense is commited against his person or property, or he is connected by blood or marriage with the person charged. So it results by the positive provisions of section 4002, if he is a male citizen, a freeholder or householder and twenty-one years of age and does not come within the express provisions of some other section of the Code disqualifying him, he is legally qualified to act as a juror, and we have

seen that in this case the juror does not come within the express provisions of any other disqualifying sections of the Code.

The judgment will be reversed, the demurrer to the plea in abatement sustained and the cause remanded.

P. B. WILLS *et al.* v. W. A. WHITMORE *et al.*

CHANCERY PRACTICE. *Assignment. Pendente lite. Court not bound to notice.* A court is not bound to notice an assignment *pendente lite.* And all interest of a complainant, under a decree in his favor, rendered after the assignment, will enure to the benefit of the assignee in such case. A complainant's want of interest in the subject matter, by reason of such fact, at the rendition of the decree, will not avoid the same.

FROM SHELBY.

Appeal from the Chancery Court. R. J. MORGAN, Chancellor.

PIERCE & DIX for complainants.

CLAPP, VANCE & ANDERSON for defendants.

DEADERICK, J., delivered the opinion of the court.

Defendants, Whitmore Brothers, as partners, brought two suits at law, in the name of Saunders, Clarke & Co. for their use, against the complainants, Wills & Bingham, as partners.

They obtained judgments, but the judgments were set aside; whereupon the circuit judge, by consent of parties, transferred the causes to the chancery court, upon the grounds that the matters in controversy were better suited to the peculiar jurisdiction of that court. Complainants, Wills & Bingham, then filed their bill, alleging that Whitmore, as assignee of Saunders, Clarke & Co., claimed that they were indebted to them, whereas said Saunders, Clarke & Co. were in fact indebted to the said P. B. Wills & Co., and that the said Whitmore Brothers were indebted to complainants for certain articles of furniture and printing materials and fixtures. For all of which they prayed that defendants be required to account, and for a decree for such sum as might be ascertained to be due to them. Respondents answered the bill, admitting that the accounts sued on in the law court had been transferred to them by Saunders, Clarke & Co., and insisting that complainants were indebted to Saunders, Clarke & Co. upon a fair settlement of the accounts between them, and agreeing that the account prayed for by complainants should be taken. They also admitted that some old material passed into their hands belonging to complainants; that they were of small value, and after allowing every credit they are entitled to, they will still be largely indebted to defendants, and pray-

ing for an account and decree. An account was accordingly ordered, and the master reported $1,137.59 due to complainants. Of this sum $962 was allowed for the furniture and printing materials, etc., including interest from December 1st, 1861, to date of report, and the residue, $175.12, for the excess of complainants' account over that of Saunders, Clarke & Co.

Exceptions were filed by the defendants and overruled, except as to the price of furniture, etc.

As to these items, the chancellor was of the opinion that their value, as shown by the evidence, was $370, with interest thereon from September 1st, 1865, the date at which said property went into their possession. No decree was rendered for the excess of complainants' account, over that of Saunders, Clarke & Co. against them, but only for the $370 and interest $144.30, making in all $514.30.

This result is sustained by the evidence. The charge is distinctly made in the bill that defendants were liable to account for the value of the furniture, printing material, etc., and the answer virtually admits the liability, but contests the value assumed in the bill.

The final decree was rendered 4th March, 1872, and upon the rendition, James O. Pierce presented in court an assignment of the claims of defendant and asked leave to file the same, which was granted, and it was further ordered that the amount of the decree, when collected, should be paid to said Pierce, and this leave and order was appended to and made part of said final decree.

A petition to rehear was presented, stating the assignment and insisting that the decree was erroneous, because the assignment, bearing date July, 1871, shows that complainants had no interest in the subject matter of the suit, when the decree in their favor was pronounced. The rehearing was granted, and Pierce upon his petition had an order to change the style of the suit so as to stand in the name of complainants for the use of said Pierce. After a demurrer to Pierce's petition, the cause was again heard, and the former decree sustained and affirmed.

In our view, the chancellor's decree of March 4th was correct. It was not necessary to take any notice of the assignment made to Pierce *pendente lite*. Story Eq. P., sec. 156.

Defendant's indebtedness to complainant was ascertained and decreed by the court by the decree of March 4th. It was not material to their rights to whom it was assigned or to whom decreed, so that they were protected against any future claim upon the same cause of action, as they were fully in this case.

The chancellor's decree will be affirmed with costs.

Knox v. The State.

Henry Knox *v.* The State.

1. Criminal Law. *Fees. Costs. District Attorney.* Previous to the act of 1875, the district attorney-general is allowed a fee of $5.00 in misdemeanors where the costs were paid or secured by the defendants, but in no case where the county pays the costs in a misdemeanor was a fee of more than $2.50 allowed. The act of 1875 provided for defendants being compelled to work out the costs, when they failed otherwise to pay or secure them; by the 11th section it is provided, that the county shall pay all the costs in misdemeanor cases, as now, and the proceeds of said convict's labor shall be paid into the county treasury. Though the attorney-general be entitled to a fee of $5.00, where the convict pays or secures the costs, and though the convict reimburses the county with the proceeds of his labor, and thereby indirectly pays the cost of his trial, yet the court hold, the attorney-general is entitled to a fee of only $2.50 under the partial provisions of Sec. 4515 of the Code, and the convict cannot be compelled to "work out" any greater amount.

2. Same. *The convict bound only for State costs.* Although the defendant be liable to judgment for his own costs, he cannot be held in custody until he pay or secure the same; he is only bound for costs on behalf of the State.

3. Same. *Chapter 83 of act of 1875. Void.* The act of 1875, ch. 83, which provides that the convict be further held in the work-house, after working out the imprisonment affixed by the jury, and all the costs in the case to work out; "also all costs which may accrue after conviction for clothing and other necessaries," considered by the court to be in violation of the 8th sec. of the bill of rights, which declares that no man shall be taken or imprisoned, etc., or deprived of his liberty, but by the judgment of his peers or the law of the land; this chapter is held by the court to be void.

Cases cited: Act of 1875, sec. 11, ch. 83; Bill of rights, sec. 8; State v. Wm. Stanton, 6 Col.

FROM SHELBY.

Appeal from the Criminal Court. T. H. Logwood, Judge.

Knox v. The State.

L. B. HORRIGAN for Knox.

ATTORNEY-GENERAL HEISKELL for the State.

McFARLAND, J., delivered the opinion of the court.

Henry Knox was convicted of a misdemeanor and sentenced to serve a term at hard labor in the work-house, and also until he shall have paid, secured or "worked out," according to law, all costs in the cause in accordance with the act of 1875, and the clerk was ordered to certify a copy of the judgment, with the bill of costs, to the superintendent of the work-house. It is necessary that the bill of costs should be thus properly certified, in order to determine how long the defendant shall remain at labor in working out the costs, in case he fails to otherwise pay or secure the costs. The court gave certain directions to the clerk in making out this bill of costs, which were excepted to, and appealed from by the defendant.

1. The court directed a fee of $5.00 to be allowed to the attorney-general. Previous to the act of 1875, the district attorneys-general were allowed a fee of $5.00 in misdemeanors where the costs were paid or secured by the defendants; but in no case where the county pays the costs in a misdemeanor was a fee of more than $2.50 allowed. The act of 1875 provided for defendants being compelled to work out the costs, when they fail to otherwise pay or secure them. By the 11th section it is enacted: "That the county shall pay all the costs in misdemeanor cases as now, and the net proceeds of said convict's labor shall be paid

into the county treasury." So that in such cases the costs are paid directly by the county, as it formerly was, but the county may be reimbursed by the convict's labor, so it is argued that in reality the convict pays the costs and the attorney-general should have a fee of $5.00. This argument is very plausible, but it is a case where the county pays the costs, as it previously did, and in such cases only $2.50 is allowed by the partial provisions of section 4515 of the Code. True, unless the convict should escape, die or be unable to labor, the county may be reimbursed, but in this there is uncertainty, the county has this risk to [illegible]

The act of 1875 does not in terms make any change in the fees of the attorney-general in such cases, and we are not disposed to add to the time that the convict must labor at twenty-five cents per day in working out the costs. Upon a doubtful construction we hold it to be clear that if the attorney-general can only receive $2.50 from the county, that the convict should only "work out" that amount. So upon this we hold that the court below erred.

2. The court directed that the defendant, in case he failed to pay the same, should be required to work out his own costs; that is, the costs of the clerk and sheriff for subpœnas and the attendance of his own witnesses. This we hold to be error. We held recently at Nashville, that the security of a defendant for "fine and costs" was only bound for the costs on behalf of the State. A defendant paying or securing the fine and costs on behalf of the State, (where there

is no other punishment adjudged) is entitled to his discharge. Although liable to judgment for his own costs, he cannot be held in custody until he pay or secure the same. The State, in one sense, has no interest in the payment of the defendant's costs. This was the law previous to the act of 1875, and this act only substituted labor in the work-house, in lieu of paying or securing the costs which the defendant was required to pay or secure in order to obtain his discharge—that is, the State's costs.

3. The action of the court is complained of in another respect. The court added to the judgment, that the defendant be further held in the work-house after working out the imprisonment affixed by the jury and all the costs in the case, to work out, also, all costs which may accrue after conviction, for clothing and other necessaries provided for by the act of 1875, ch. 83, 117. The 4th section of the act is: "That every person confined in a work-house for failing to pay or secure his fine and costs or costs only, as the case may be, shall be credited at the rate of twenty-five cents per day in addition to the jailor's fees, and no person shall be discharged from the work-house before said fines and costs, *and the costs of all necessary clothing provided*, have been fully paid as aforesaid, or the county judge so orders. Provided, that no person shall be discharged except upon certificate of a physician that such person is unable to labor."

It is argued that this provision is subject to great abuse that the keeper of the work-house may, if he

choose, continue to furnish the convict with clothing, to be worked for at twenty-five cents per day, and thus prolong his imprisonment almost indefinitely, and that there is no adequate provision to protect the convict from such impositions. We think this provision is seriously objectionable. The convict is required to work out the costs, including all jailor's fees accruing before *and after conviction*, and down to final discharge, but the costs and jailor's fees are fixed by law, and the convict is credited by twenty-five cents per day and jailor's fees. The time the convict is to labor in the work-house to pay the cost of his necessary clothing is not ascertained by the judgment of the court, nor is it fixed so that it may be rendered certain by any law of the land; it is to be determined only by the discretion of the superintendent of the work-house, or by his agreement with the convict on the other hand. But it is not an objection by which we can declare the law void, that it is liable to abuse, unless it violates some restriction of the constitution. Does it violate the 8th section of the bill of rights, which declares "that no man shall be taken or imprisoned . . . or deprived of his liberty but by the judgment of his peers or the law of the land"?

We refer alone to such imprisonment as the convict may be compelled to undergo in working out the costs of clothing afterwards to be provided for him—would such imprisonment be by the judgment of his peers or the law of the land? The duration of such imprisonment is to be determined alone by the super-

intendent or keeper of the workhouse, unless we suppose the convict may consent to it—how long the convict is to labor on this account the superintendent is to determine.

The law of the land, in the sense of this clause of the constitution, has been held to be equivalent in meaning to "due process of law." A mere legislative act depriving a citizen of his liberty, is not in this sense the law of the land, unless it authorizes a proceeding wherein the party whose right is involved can have or is authorized to have a hearing and make defense. Says Mr. Webster, due process of law or the law of the land, "Is the general law which hears before it condemns, which proceeds upon enquiry and renders judgment after trial." It is not enough that the law may be general in its application. "It is not," says Mr. Cooley, "the partial character of the rule so much as its arbitrary and unusual nature, which condemns it as unknown to the law of the land." See *The State* v. *Wm. Staten*, 6 Col., where these authorities are quoted and approved and enlarged upon in the opinion of Judge Smith. Apply these principles to this case. Suppose, after the convict has been imprisoned a time sufficient to pay the costs in the case, the superintendent of the work-house assumes the right to hold him a still longer time to work out the cost of clothing furnished, and the convict denies the right, denies that the clothing has been furnished or received by him, denies the cost or value charged by the keeper. Where is his remedy? He has never had an opportunity to be heard upon these questions, no court has

passed judgment upon these disputed facts. His keeper says the cost of necessary clothing furnished is $10.00, and that the convict shall serve forty days, and to this imprisonment he is condemned without a hearing, and condemned by a tribunal unknown to the law, and left without a remedy, unless it be by writ of *habeas corpus;* but the constitution does not leave him to this remedy. He should be condemned first, and not first imprisoned and afterwards left to obtain his discharge, if not willing to submit. The remedy of *habeas corpus* in such a case would be without the trial by jury, to which the defendant was entitled.

We are of the opinion that the objections to this feature of the law are of a grave character; that it seriously affects the constitutional rights of the citizens, and might often result in prolonged imprisonment and gross oppression, and we are therefore constrained to declare it void.

We are aware that if no provision be made for clothing prisoners, that serious embarrassment will follow, but these considerations do not, in our opinion, meet the objections to the law we have pointed out. These difficulties may perhaps be obviated by legislative action.

Judgment reversed.

STATE, for the use, etc., v. JAS. A. MURRAY, Adm'r.

ADMINISTRATOR. *Statute of two years and six months does not run against creditor. When.* If an administrator negotiates for delay, until the happening of a certain possible event, and obtains it, with or without special verbal request, and the effect of it has been to paralyze the vigilance of the creditor, he will not be entitled to the benefit of the statute by reason of such delay.

FACTS. The administrator sought an interview with the creditor upon the subject of a settlement, remarking to him that he wanted to settle the whole matter, but did not wish to do so until he could settle with another creditor at the same time. The court say, this was sufficient application for delay, to protect the creditor and save the bar.

Cases cited: F. & M. Bank v. Leath, 11 Hum., 515; Birdsong v. Birdsong, 2 Head, 603; Trott v. West, 9 Yer., 433; 1 Sneed, 470; Buckett v. James, 565–567.

Code cited: Sections 2280, 2785.

FROM FAYETTE.

Appeal from the Circuit Court. T. J. FLIPPIN, Judge.

CLAPP & MEUX for plaintiff.

H. C. MOORMAN for defendant.

SNEED, J., delivered the opinion of the court.

The action was brought by N. W. Galloway, one of the distributees of the estate of Emma C. Galloway, dec'd, against the defendant, as administrator of the estate of Jas. H. McMurray, dec'd, to recover the plain-

tiff's distributive share of said Emma's estate, ascertained by settlement of accounts of defendant's intestate in his lifetime to be due.

The settlement of defendant's intestate was had on the 3d of February, 1868, and shows a balance due the estate of said Emma of $234.05, one-half of which belonged to plaintiff as distributee, and the other half to his sister, Mrs. Partee. The defendant's intestate died in 1870, and on the 9th November, 1870, the defendant was qualified as his administrator. This action was begun on the 3d May, 1875, more than two years and six months, as will be observed, from the qualification of the defendant. He relied upon the statute of limitations of two years and six months as a bar to the remedy. The case was submitted to the circuit judge without a jury, who was of opinion, from the proof, that the bar of the statute was saved by a request for delay on the part of the defendant, made before the lapse of the prescribed period of the statute had expired. He accordingly rendered judgment for the plaintiff, from which the defendant has appealed in error.

The statute relied on to obviate the bar is in these words: "If any creditor, after making demand of his debt or claim, delay to bring suit for a definite time at the special request of the executor or administrator, the time of such delay shall not be counted in said periods of limitation." Code, section 2280. Another section of the Code is as follows: "Any delay granted by the person entitled to sue, at the special request of the personal representative, shall not be counted in

the time," etc. Code, section 2785. These sections of the Code of 1858 were brought into it from the proviso to section four of the act of 1789, ch. 23, prescribing the period within which actions must be brought against the representatives of deceased persons. Under these provisions it has been held that the request for delay must be special and for a definite time, or until the happening of a certain event. *F. & M. Bank* v. *Leath*, 11 Hum., 515; *Birdsong* v. *Birdsong*, 2 Head, 603; *Trott* v. *West*, 9 Yer., 433. Thus a request for delay until the personal representative shall collect the debts of the estate, or until he can collect the money, is sufficiently definite. 1 Sneed, 470. Or until the land bought by the testator should be paid for. *Puckett* v. *James*, 2 Hum., 565. It is manifest from these decisions that there has been a departure from the strict letter of the statute, in order to administer it in its spirit and to meet the right and justice of the case as they may arise. The facts of this case are, that there were but two distributees of the fund, the plaintiff and his sister, Mrs. Partee, the latter a resident of the State of Mississippi. In the summer of 1872 the defendant sought an interview with the plaintiff upon the subject of a settlement, remarking to him that he wanted to settle the matter, but did not wish to do so until he could settle with both of the distributees at once—claiming that Mrs. Partee was owing his father's estate, and that he wanted to settle the whole matter at once. The clear import of the defendant's language was, that he would settle as soon as Mrs. Partee came up from Mississippi

No express request for delay was made, further than these words import. The plaintiff said to defendant during the interview in substance, that the settlement of his interest would in no manner interfere with the defendant's settlement with Mrs. Partee. The latter did come into the neighborhood sometime afterwards, but the defendant failed to have a settlement with her, and has failed and refused thus far to pay the plaintiff his share of the fund. The plaintiff being his own witness, states that the settlement with him was deferred at the request of defendant until a settlement could also be had with Mrs. Partee, and it was the understanding of plaintiff that the settlement with him was deferred by the defendant until Mrs. Partee should come up, and then the whole matter could be settled at once. He states further, that defendant did not request delay from him as to said settlement to any specific or definite time, nor did he promise to pay the claim in any other or further manner than the statement that he wanted to settle the whole matter at once. "He told me," says the plaintiff, "that he wanted to settle the whole matter at once, but did not request any delay, or ask me not to bring suit for my share." The defendant was also a witness, and his testimony is but slightly variant from that of the plaintiff. Are these facts sufficient to save the bar of the statute? Certainly the judgment below accords with the right and justice of the case. The statute was never intended as a decoy duck or a snare by which to entrap the unwary and credulous creditor, and when such a case is presented, if clearly within

the equity of the statute, no refined and technical construction should be allowed to defeat the right.

In one of the cases cited, it was settled that to speak of the claim and desire its payment is a sufficient demand in the sense of the statute. *Puckett* v. *James*, 2 Hum., 567. We need not go a step further in holding, upon equal reason, that a negotiation by the administrator with the creditor about the claim, in which it is understood that the administrator wishes to defer a settlement for a definite time, or until the happening of a certain possible event, is a sufficient request for delay in the sense of the statute. The object of the statute was to relax the operation of the statute of limitations for the benefit of the creditor as well as of the estate, and in the interest of common honesty and justice. After the administrator has negotiated for delay and obtained it, with or without a special verbal request, and the effect of it has been to paralyze the vigilance of the creditor, and the administrator seeks advantage of his own wrong, certainly the statute must be held to protect the creditor and save the bar. In such a case we hold that the spirit of the law is answered.

Affirm the judgment.

L. KALISKY v. ALLEN CURREY.

APPEAL. *Garnishment. Judgments and decrees.* The original debtor may appeal from a judgment rendered against a garnishee, though the latter does not complain.

Cases cited: Kaylor v. Brunswick, 6 Heis., 235.

Code cited: Sections 3492, 3100.

FROM FAYETTE.

Appeal from the Circuit Court. T. J. FLIPPEN, Judge.

W. A. MILLIKEN for plaintiff.

H. C. MOORMAN for defendant.

FREEMAN, J., delivered the opinion of the court.

Kalisky had a judgment and execution against Currey before a justice of the peace. Peebles was summoned by the officer under garnishment process and answered, on which a judgment was rendered against Peebles for $46, supposed to be owing by him to said Currey. Currey, the original debtor, appealed to the circuit court, Peebles did not. On the hearing in the circuit court, the court held the facts as to indebtedness insufficient, and gave judgment for defendant, from which plaintiff appealed to this court.

It is clear, from the answer of the garnishee and from the facts of the case, no judgment could properly have been rendered against him in the case. The

debt he acknowledged was not due to Currey, but to Currey & Patterson, as partners in the well-digging business.

The only question is, whether an appeal will lie by the original debtor in such a case as this, the garnishee not complaining. It is insisted that section 3492 of the Code, authorizing an appeal in all garnishment cases at the instance of the plaintiff, the defendant or the garnishee, only applies to cases of attachment by garnishment. If this is not correct, it is clear the language allows the present appeal on the part of the defendant. Under title "Execution," sec. 3100, among the provisions for garnishment under executions, it is enacted: "The provisions of the Code in regard to garnishment on attachments, regulate proceedings under this article whenever applicable."

The section providing for appeals, as quoted above, is one of these sections. We can see no good reason why it is not applicable, and so we held in a case at last term.

It would be difficult to hold that the defendant might appeal only to show that the debt was paid, or to fix any limitation upon his right. The language of the case in 6 Heiskell, 235, is not in conflict with this view, especially when taken in connection with the facts of the case before the court. We hold the defendant had the right to appeal, and the court properly refused to render a judgment against the garnishee on the facts as to his indebtedness.

Affirm the judgment.

TERRELL THOMPSON, Surviving Partner, etc., *v.* W. W. WICKERSHAM and J. N. WARDLAW.

HOMESTEAD. *Right of. Cannot prevail over vendor's and mechanic's lien. When. Such lien continues. How long. And may be enforced. How.* The homestead right cannot prevail over the lien given by statute, in favor of one furnishing the material for the building on the lot claimed as a homestead, and this lien includes not only the buildings erected, but also the lot upon which they are erected, and continues for one year after the time at which the materials were furnished. The lien thus given by statute may be enforced by attachment either at law or equity.

Code cited: Sections 1981*a*, 2114*a*, 1985, 1987; Act of 1870.

FROM SHELBY.

Appeal from the Chancery Court. R. J. MORGAN, Chancellor.

No counsel marked.

DEADERICK, C. J., delivered the opinion of the court.

In August, 1873, complainant filed his attachment bill against defendants, to enforce a lien given by sec. 1981*a* of the Code, for material furnished in October, 1872, to defendant Wickersham, for building a house, erected by him, upon a lot described in the bill. The lot was bought of defendant Wardlaw, and the bill seeks, subject to the vendor's lien, to have the lot and building thereon sold to pay for the materials furnished. The chancellor so decreed, and the defendant Wickersham appealed.

He resists the recovery on two grounds: first, upon his homestead right, and secondly, upon the ground that the 25,000 brick he got, being the material alleged by complainant for which he seeks a recovery, in fact belonged to him and one Boydston as partners.

The acts exempting the homestead from sale by execution or attachment for debts, do not exempt it from sale for the satisfaction of any debt or liability contracted for its purchase, or legally incurred for improvements made thereon. Act of 1870; Code, section 2114*a*.

And section 1981*a* of Code, gives a lien in favor of all persons furnishing any portion of the material for the building contemplated by section 1981.

The homestead right, therefore, cannot prevail over the lien given by statute in favor of one furnishing material for the building on the lot claimed as a homestead. And this lien includes not only the buildings erected, but includes also the lot upon which the buildings are erected—Code 1985—and continues for one year after the time at which the materials were furnished. The lien thus given by statute may be enforced by attachment, either at law or in equity. Section 1987.

The evidence in the cause satisfies us that defendant Wickersham had no claim as a partner upon the brick he received of complainant. If he had any claim, it was against Boydston, upon the footing of a separate contract between him and Boydston, that he, Wickersham, was to have one-half of the profits of Boydston's contract. But even this claim is not sat-

satisfactorily made out. Boydston denies it, and admits that he received from Thompson all the brick he was entitled to, under his contract with them, and Thompson proves that he sold the brick to Wickersham, which went into the building, and notified him that he held him responsible for them.

We are, therefore, of opinion that the chancellor's decree was correct, and affirm it.

R. J. Blackwell v. Wm. H. Fitzpatrick, Adm'r.

Bills and Notes. *Assignment of. Evidence. Pleading and practice. Magistrate.* Where a party sues upon a note that has been assigned to him, it is necessary that he should prove the assignment, if contested, in order to establish his claim to the paper sued on; yet such assignee will not be required to prove the assignment, unless it be denied *by* plea. If the suit originates in the circuit court, the plea should be in writing; if before a justice of the peace, the plea may be oral, either before him or on appeal to the circuit court.

Cases cited: Richardson & Price v. Cato, 9 Hum., 460; Stone v. Bond, 2 Heis., 425.

FROM LAUDERDALE.

Appeal from the Circuit Court. T. J. Flippin, Judge.

Lynn, Oldham & Connor for plaintiff.

Bate & Smitheal for defendant.

DRADERICK, J., delivered the opinion of the court.

Fitzpatrick, as administrator, obtained a judgment against Blackwell, before a justice of the peace of Lauderdale county, upon a note assigned to his intestate. Blackwell appealed to the circuit court. The note upon the trial was read, to which defendant objected. The bill of exceptions shows that all the evidence in the cause was the note sued on and the assignment thereof by the payee to plaintiff's intestate.

The circuit judge, a jury being waived, rendered judgment in favor of plaintiff, and defendant appealed.

The error assigned is, in allowing the assignment of the note to be read before any evidence of the assignment was introduced.

In the case of *Richardson & Price* v. *Cato*, 9 Hum., 460, it was held, in a case originating before a justice of the peace, to be error in the circuit judge to overrule an objection taken on the trial to the reading of the assignment of the note sued on, the objection being, as stated at the time, *upon the ground that such assignment was not proved;* the court holding that the objection taken was equivalent to an oral plea, which was sufficient in a case coming up from a justice of the peace by appeal.

To the same effect is the later case of *Stone* v. *Bond*, 2 Heis., 425.

But in both these cases it will be observed that the facts relied upon and stated in the objection to the reading of the assignment was, that the assignment was not proved, and it is this oral statement of the

ground of the objection which was regarded in the one case as equivalent to the plea of non-assignment, and in the other as a defense which might be made orally on the trial, no written pleadings as a general rule being required in cases coming by appeal from a justice of the peace.

The objection, without specifying the grounds of it, cannot be considered a plea. A plea by a defendant in an action is a statement of facts constituting the grounds of his defense.

The objection taken in this case was to the reading of the *note*, without any specification of the grounds of the objection or statement of facts upon which the objection rested or was based.

If the ground of the objection had been specified, the oral plea thus interposed might have been answered by appropriate evidence. And while it is necessary that plaintiff should prove the assignment, if contested, in order to establish his claim to the paper sued on, yet the assignee will not be required to prove the assignment, unless it is denied by plea. If the suit originates in the circuit court, the plea should be written; if it originates before a justice of the peace, the plea may be oral, either before him or on appeal to the circuit court.

Let the judgment be affirmed.

PARKER'S HEIRS v. H. IRBY *et al.*

1. CHANCERY PRACTICE. *Principal and surety. Guardian and ward. Administrator. Insolvent estate.* A bill for an account may be maintained against a surety of a deceased guardian, without making the administrator a party, where the insolvency of the guardian is alleged.
   Cases cited: Foster v. Maxey's Ex'r, 6 Yer., 224; Pass v. Dibrell, 8 Yer., 470.
   Code cited: Sections 2784, 2787.
2. SAME. *Same.* If the interest sought to be reached by the bill so filed, is for the benefit of a distributee of the deceased ward, the complainant must pursue his right through that person's representative.

FROM SHELBY.

Appeal from the Chancery Court. R. J. MORGAN. Chancellor.

METCALF & SCARBROUGH for plaintiffs.

LOGWOOD & MICOU for defendants.

Opinion by the court.

The case stands upon demurrer. The bill is filed by the wards of Davis Biggs, deceased, their late guardian, against Harrison Irby alone, as a surety on the guardian bond, for an account and settlement of the complainants' demands against said guardian; and they seek also by their bill, as distributees of a deceased ward, to recover his share and to have distribution thereof among them. The administrators of the deceased guardian and of said deceased ward are not made parties to the bill, and this is made ground of demurrer.

The demurrer assumes other grounds, which we hold, under our liberal system of practice, are not well taken, and which it is not necessary to notice, further than to observe that the case made in the bill is properly cognizable in a court of equity, and that if there be any merit in the defense of the statute of limitations, which we do not decide, the benefit thereof will be reserved to defendant upon proper plea below.

The ground mainly pressed in argument here is, that the bill for an account cannot be sustained against the surety without making the representative of the deceased guardian a party defendant. This might be so according to the strict rules of equity practice, but for the distinct allegation that the estate of the guardian is insolvent. While in such cases it is the better practice to have the guardian or his representative before the court, yet even under the old practice the failure to do so where insolvency is alleged, would not be fatal to the bill—and especially so under the broad provisions of our statute regulating the liability of parties to joint obligations, and prescribing the remedies as against principals and sureties. In such a case we hold that a bill for an account may be maintained against the surety alone. Story Eq. Pl., sec. 169; 1 Story Eq. Jur., sec. 494–496; 1 Dan'l Ch. Pr., 270–271; Code, secs. 2784–2787; 6 Yer., 224; 8 Yer., 470.

We hold, however, that the complainants must pursue their rights as distributees of the deceased ward, through his representative, who should be brought before the court, and should be a party to the suit.

Thus modified, the decree disallowing the demurrer will be affirmed and the cause remanded, that an administrator of the deceased ward may be made a party, and for further proceedings.

JAMES COPELAND v. THOMAS E. BOAZ.

MARRIED WOMEN. *Bills and notes. Public policy.* A note executed by a husband, living separate from his wife, to a trustee for her, as an inducement for her to return to him, is *malum pactum*, and contravenes public policy, and is not tolerable in law.

FROM DYER.

Appeal from the Circuit Court. S. W. COCHRAN, Judge, *pro tem.*

RICHARDSON & ANDREWS for complainant.

LATTA & MARSHALL for defendant.

TURNEY, J., delivered the opinion of the court.

The suit was instituted upon the following note:

"On or before the 25th day of December next I promise to pay Thos. Boaz, trustee for my wife, five hundred dollars, for value rec'd. This June 29, 1872.

"James Copeland."

It appears from the record, the plaintiff in error and his wife had separated, and the note sued on was executed to induce her to return.

The court struck out pleas setting up these facts and charged the jury the consideration was sufficient. In both of these rulings the circuit judge was in error. The relation of husband and wife was in nothing changed by the separation. All the obligations, moral and legal, still rested upon them. The parties could not and did not by the separation diminish or enlarge their respective rights and duties under the law regulating the relation of husband and wife.

The most that can be made of the undertaking here will not carry it above the grade of an executory contract. A promise by the husband to pay to the wife, or to another for the benefit of the wife, without more, is a *nudum pactum*. The undertaking contravenes public policy, is primitive of separation of husband and wife, and not tolerable in law.

Reverse the judgment.

Samuel Maynard v. The State.

1. Office and Officer. *Forfeiture of fees by officers. When.* In cases where the Legislature has made the performance of any duty pertaining to an office, a condition upon which fees or salaries are to be paid, the officer is not entitled to demand his fees until such duties are performed.

2. Same. *Clerks of Circuit Court.* Clerks of Circuit Court shall forfeit their costs, as provided in Section 5242 and sub-secs. 6 and 7 of Code.

Code cited: Section 5242, sub-secs. 6 and 7.

FROM WEAKLEY.

Appeal from the Circuit Court. Jos. R. Hawkins, Judge.

M. D. Cardwell and C. M. Ewing for Maynard.

Attorney-General Heiskell for the State.

Turney, J., delivered the opinion of the court.

On the 21st of February, 1877, the jury was placed in charge of J. F. Smith, deputy sheriff, "who was sworn to keep them together and separate and apart from all other citizens." This oath is not as required by law, as held in *Duncan* v. *The State*, and several subsequent cases. It is insisted, however, that the deputy sheriff was an officer of the court, and no official oath was necessary for him.

The law makes no distinction in favor of sheriffs as against constables or other officers, and we can make none.

There is nothing in the office or oath of office to authorize the distinction contended for, and we can see no reason why the same bad results may not flow from a failure to impose the same strict, sworn duties upon a sheriff or deputy, as upon another to whose charge a jury may be committed.

We are not prepared to subscribe to the doctrine of the Louisiana and Virginia cases on this question, nor do we know the statutes and rules of practice in those States as to the powers and duties of sheriffs and the care of juries in criminal cases.

The *venire* is proven neither directly nor circumstantially.

Reverse the judgment.

NOTE.—The Attorney-General in this case stated that he had requested the several district-attorneys to see that the entry of *respite* should be in general terms, "that the jury returned in charge of an officer duly sworn." In consequence of the defect in this case, he moved to cut off the clerk's cost, which was done, and he announced that he would uniformly insist on forfeiture of cost of clerks whenever they attempted to make this entry in form and failed to make it in full. The entry in the form suggested, returned under an officer duly sworn, can hardly be mistaken or missed.

THE STATE *v.* ANTHONY.

MAGISTRATES' FEE. *For taking down proof in criminal cases.* Under sec. 5062 of the Code, under the caption, "proceedings before committing magistrates," it is enacted: "The evidence of witnesses examined shall be reduced to writing by the magistrate, or under his direction, and signed by the witnesses respectively." For such services Magistrates are allowed the same fee as prescribed by law for the taking of depositions.

Code cited: Secs. 5062, 4550.

FROM HARDEMAN.

Appeal from the Circuit Court. T. J. FLIPPIN, Judge.

ATTORNEY-GENERAL HEISKELL for the State.

F. FENTRESS and F. WILLIAMS for Anthony.

FREEMAN, J., delivered the opinion of the Court.

By the Code, sec. 4550, after fixing the fees allowed justices of the peace in the cases specified, it is provided that, "for any other service required by law in criminal cases, the same fees allowed by law in similar services in civil cases."

Taking down the testimony in criminal cases on preliminary examinations by justices is a service required of them by law. In such cases no fees are prescribed in this section of the Code. They must either be allowed no fees for this service, (which is not to be presumed) or allowed some "fees as allowed

in similar services in civil." The only services similar to this in civil cases performed by a justice is the taking of depositions. The services in the one case are similar or like the other. It is the taking down in writing officially the testimony of a witness. It is true in this case it is not necessarily to be used as testimony in the criminal case, but in certain contingencies it may be so used. The uses to which the testimony may be applied I do not think furnish any guide to the determination of the question before us, but only the question as to whether the services are similar. If they are, then like fees are to be allowed as in civil cases for such similar or like character of services. It is not provided that the services shall be identical in every particular in order to make the fees in one case the same as in the other, but only shall be similar, that is of like kind. I think the likeness in the services in the two cases is so clear, and in so many particulars, as sufficiently to fix the rate of the fees under the provisions of the Code cited to be the same, therefore the fees ought to be allowed.

TURNEY, J., delivered the following opinion:

By sec. 5062 of the Code, under the caption, "proceedings before committing magistrate," is enacted: "The evidence of the witnesses examined shall be reduced to writing by the magistrate or under his direction, and signed by the witnesses respectively."

Sec. 4550, after fixing the fees allowed justices in

criminal cases in certain specified items of service by sub sec. 8, enacts: "For any other service required by law in criminal cases the same fees allowed by law in similar services in civil cases."

By statute a fee of one dollar is allowed for the taking of a deposition by a justice of the peace or other authorized officer.

A deposition is the attested written testimony of a witness. The evidence committed in full substance to writing by the magistrate, signed by the witness, in criminal cases, comes within this definition.

The taxation is proper and will be certified.

JOHN MOSES v. THE STATE.

CRIMINAL LAW. *Copy of indictment. Prisoner entitled to. In all cases. Not restricted to capital cases.* Prisoners in actual confinement are entitled to a copy of the indictment in all criminal prosecutions. This right is not restricted, as would be inferred from sec. 5209 of the Code, to capital offenses. The prisoner can waive the right, and if he does not demand it such waiver will be implied.

Case cited: Nokes *v.* The State, 6 Col., 297.

Code cited: Sec. 5209.

FROM HAYWOOD.

Appeal from the Circuit Court. G. B. BLACK, Judge.

Moses v. The State.

A. D. BRIGHT for Moses.

ATTORNEY-GENERAL HEISKELL for the State.

SNEED, J., delivered the opinion of the court.

The prisoner appeals in error from a conviction of mayhem. The indictment was found against him on the 9th of March, 1877, and he was put upon his trial on the 13th of March, 1877, and was in jail from the period of his arrest until the termination of his trial, except during the progress thereof, when he was in the custody of the sheriff.

Before his trial was commenced he demanded a copy of the indictment against him, which was refused. This was error. "In all criminal prosecutions the accused hath the right to demand the nature and cause of the accusation against him, and to have a copy thereof. Con. Tenn., art. 1, sec. 9. To give effect to this provision of the organic law the statute provides, that "every person indicted for a capital offense, if he is in actual confinement, is entitled to a copy of the indictment at least two entire days before trial. Code of Tenn., sec. 5209. In the opinion of the court there is no authority for the restriction of this constitutional right to caapital cases. It applies alike to all criminal prosecutions. The prisoner has a right to waive the right, and if he does not demand it, such waiver will be implied. But when demanded it is error to refuse it. *Nokes* v. *The State*, 6 Col., 297.

Let the judgment be reversed.

HUBBARD, EX'R. *v.* WM. J. EPPS *et al.*

1. STATUTE OF LIMITATIONS. *Wills. Administrators and executors. Trusts.* Where a will directs that certain lands shall be sold for the payment of debts generally, this does not create such a trust in favor of creditors as will prevent the running of the statute of limitations against the collection of their claims out of this specific property. The creditors must still present and collect their claims through the personal representative as such, subject to the same limitations that apply in other cases.

2. SAME. *Same. Non residents.* Where the testatrix lived and died in Virginia, leaving land in this State, in a suit by creditors from that State seeking to subject the land in this to their claims, our statutes in favor of the personal representative here are held to apply, though they bar the debts of such creditors' whether the laws of Virginia would recognize them or not.

FROM MADISON.

Appeal from the Chancery Court. H. J. LIVINGSTON, Chancellor.

TOMLIN & TOMLIN for complainant.

CAMPBELL & MCCRORY, CARUTHERS & MALLORY and D. E. MYERS for defendants.

MCFARLAND, J., delivered the opinion of the court.

An opinion was rendered in this cause at the last term, in which it was announced that the general direction in the will of Mrs. Martha B. Epps that her lands in Madison county, Tennessee, be sold to pay any debts she might owe, did not create such a

trust in favor of creditors generally as to prevent the further operation of the statute of limitations so as to bar their claim to satisfaction out of the lands, and that the claim of A. C. Page and others was barred because not filed within the time allowed for bringing suits or filing claims against personal representatives. A petition to rehear was filed and held under advisement until the present term.

We cited, in support of our conclusion, from Mr. Perry's work on Trusts, where the doctrine, as we stated it, is broadly announced as the law in the United States.

We have been furnished with an able and elaborate review of a number of the authorities cited to support the text by Mr. Perry, in which counsel have undertaken to show that they do not sustain the author, and that the rule is laid down differently in Hill on Trustees, and that the latter author is sustained by the great weight of not only English, but American authority.

We do not suppose that the few cases within our reach fairly indicate the general current of decision upon the question, and it would not be profitable to undertake to review them.

We must admit that the cases we have examined do not go to the length we have announced, but still we have the high authority of Judge Story for the proposition. He says: "A general direction in a will of personal estate to pay debts will not stop the running of the statute of limitations, or if the bar has already attached, remove it. The same rule is equally

applicable to the case of a devise of charge upon the real estate for the payment of debts. In no case will it take the debt out of the operation of the statute of limitations and prevent the running of the statute. But a direction to pay certain scheduled debts out of a particular fund of personal estate will take these debts, to the extent of the fund, out of the statute of limitations, and prevent its running. And the like doctrine would probably be applied to cases of trust charges upon real estate for the payment of scheduled debts." See Story E. J., sec. 1521*a*.

It is conceded that as to the personal estate any such general direction in a will as to payment of debts, is wholly inoperative in this respect. No valid trust is thus created, for the reason that the law makes the personalty assets for the payment of debts, and the rights of creditors are neither greater or less than without such direction in the will.

It would seem to follow as a logical conclusion that where lands were made assets for the payment of debts the same rule would apply, the only difference being that the lands are reached by a different process, and where not otherwise directed the personal assets are to be first exhausted.

By the common law, lands were not assets for the payment of debts generally, and courts of equity in favor of doing justice to creditors were ready to construe a devise or charge upon lands for the payment of debts as raising a trust by implication, which the creditor could enforce, and hence the doctrine originated. It is true the English courts have held that

the rule was not changed or affected by the acts making lands assets for the payment of debts, and many American cases have acquiesced in the holding, but as the effect of placing such charge or devise upon the ground of a valid trust between the executor and the creditor was to cut off the defense of the statute of limitations, the American courts have yielded to the doctrine, where they have done so at all, very reluctantly, and as the purposes of justice no longer favor the doctrine, the tendency has been to avoid construing devises of this character as implying a trust.

While admitting that where the trust is in terms created by the will, it is valid as such, yet the effect has been avoided by construing the will against the trust in all doubtful cases. See 2 Dev. & B. Eq., p. 101; *Carrington & Co.* v. *Manning's Heirs*, 13 Ala. We think the more direct way to deal with the question is to hold that the reason for declaring and enforcing such a trust no longer exists, and to abandon it altogether, especially when we have the high authority we have quoted to sustain us, and, moreover, what seems to us to be sound and logical reason upon the question. Lands are now assets for the payment of debts as well as personalty, though they are reached in a different mode, and if a general direction in a will, that the testator's debts shall be paid out of certain personal assets, does not create such a trust as to those assets in favor of the creditor as to stop or affect the statute of limitations, what sound reason can there be for applying a different

rule where the direction is to pay the debts by a sale of certain lands.

Before lands were made assets for the payment of debts, there was a reason for the distinction, and courts of high authority have said that the trust should still be upheld; that the law was not changed by making lands assets. But we think this was simply adhering to the rule, after the reason for it had ceased to exist. Our laws not only make lands assets for the payment of debts, but point out definitely how the lands may be reached. Such a direction in a will may give the executor power to sell without applying for a decree of court, but the trust thus imposed upon him in respect to the debt is not otherwise materially different from the trust the law imposes upon an administrator. No particular debts are recognized, no trust relation is thereby created between the executor and any particular individuals as creditors. Their positions are antagonistic. It is the executor's duty to resist all claims not legally established or known to be just, and to set up every legal and valid defense. This is certainly his duty where the debts are to be paid out of the personalty, whether the will so direct or not, and why should a different rule apply as to realty? Is it possible that, upon a general direction of this character, all debts not then barred may come in for satisfaction out of this property without any limit as to time? Should the administration of insolvent estates be thus indefinitely postponed?

It is further argued that our acts of 1827 and 1831, authorizing an executor or administrator to apply

to the chancery or circuit court for the sale of lands for the payment of debts, in terms only applies to cases where the executor is not authorized by will to sell, and therefore, where the executor is authorized by the will to sell the law is unchanged by the statute and remains as before, and in such case the land can only be reached by construing the will to create a trust in favor of the creditors.

But by another statute every debtor's property (and this included land), except such as may be specially exempt, is assets for the payment of his just debts. Code, sec. 2252. The land is none the less assets when the will directs that it shall be sold to pay the debts.

The right of the creditor to satisfaction does not depend upon the direction in the will, it exists independent of it.

And such a direction in a will only amounts to this: all of the property of a decedent, except such as may be exempt, is assets for the payment of his debts by positive law, independent of any direction to that effect in the testator's will, but the will may designate certain parts of the property to be first applied to the debts, and give the executor the power of sale, and this direction and power of the will will be followed by the courts, and so the acts pointing out the mode in which lands are to be subjected to the debts by decrees of courts, in terms only refers to cases where no power of sale is given by the will, for the reason that in such cases no decree of sale is necessary. But it does not follow from this that the

creditor's right depends upon such provision in the will, on the contrary, if for any reason this power of sale be not executed, there can hardly be any doubt that a court could, under the acts referred to, sell the land for the benefit of creditors.

The remedy could hardly be confined to a decree of the chancery court compeling the executor to execute the power, but either a circuit or chancery court might, by following the act of 1827, proceed directly to sell the land.

But it is again argued that the doctrine, that the statute of limitations does not bar debts as to the real estate charged by the will with their payment, has been recognized in applying the statute of limitations to the claims of executors against the estate.

It having been held that personal representatives are themselves limited by the statutes, there being no exception in their favor, and they must therefore show that they have retained their debts within the time limited; but it has been further held, that in order to bar their claims it must appear that they have had legal assets in their hands sufficient to satisfy their debts; that their failure to satisfy them out of equitable assets does not bar them.

This qualification of the general rule, it is earnestly maintained, shows that no statute applies as to such equitable assets, for if no statute applies against the executor, none can apply against the other creditors as they all stand upon the same ground. The rule holding personal representatives barred because of their failure to show, by their settlements, within the time

that they had retained their own debt, where they are otherwise legally excused from making a general settlement within the time, is a hard one, and it will be found that the qualification of the rule mentioned is not put alone upon the ground stated, but in *Harrison* v. *Henderson*, 7 Heis., it was held, that though the assets were legal assets, the executor's claim would not be barred unless he had money in his hands out of which he might have retained his debt in time.

Without further discussion we are fully satisfied to hold that the statute of limitations are not abrogated by a general charge in a will directing that certain lands be sold for the payment of debts. The creditors must still present and collect their claims through the personal representative as such, subject to the same limitations that apply in other cases. Of course this discussion does not apply to a case where the will charges the payment of debts by name upon the testator's property.

Another question has been presented. The testatrix was a resident of Virginia, where she died, and her will was made and probated there, and it appears that all the creditors who have appeared are citizens of Virginia.

It has been submitted that the estate here should be distributed according to the law of Virginia, where, it is said, the claim of Epps would not be barred, or the fund should be transmitted to the principal administrator in Virginia.

This bill is filed by Hubbard as personal representative in this State. The statutues of this in his

favor we suppose must apply as to all creditors no matter where they reside. Whether, if there be a surplus, it should on proper application be transmitted to the Virginia administrator does not now arise.

Petition to rehear will be dismissed.

CITY OF MEMPHIS *v.* FISHER.

SPECIAL LEGISLATION. *Unconstitutional. Municipal corporations. Bond for costs.* An act providing that cities of a certain population and over may institute suits, etc., without giving bond for costs, is unconstitutional and void.

FROM SHELBY.

Appeal from the Circuit Court. C. W. HEISKELL, Judge.

SAMUEL P. WALKER for plaintiff.

RANDOLPH, HAMMOND, JORDAN and TURLEY for defendant.

FREEMAN, J., delivered the opinion of the court.

By an act of the Legislature of 1875 municipal corporations with a population of 35,000 or more, were

authorized to institute suits either at law or in equity in any of the State courts, without giving bond for costs, and also to prosecute appeals, writs of error, attachments, injunctions, etc., without giving security for costs.

In this case a motion was made to dismiss the appeal of Memphis under this act.

Held, that while municipal corporations in some sense are public bodies having powers conferred on them appertaining to sovereignty, such as power to levy and collect taxes, yet in another aspect, as when they become suitors, or are sued in courts, they stand as individuals. In this latter view municipal corporations must be governed by the general law, and can have no "general law suspended for their benefit, nor any law passed for their benefit inconsistent with the general law of the land." Art. XI., sec. 8, Constitution of Tennessee. The act of 1875 is repugnant to this section of the Constitution, and therefore void.

Motion sustained with costs.

STATE OF TENNESSEE *v.* E. H. PHELAN *et al.*

CRIMINAL LAW. *Judgments and decrees. Nolle prosequi. Error to set aside. When.* A *nolle prosequi* was entered at one term of the court through mistake. During that term, in the absence of defendant, it was set aside, and the case reinstated on the docket. At the next term the defendant moved to set aside the order reinstating the cause, which was done. *Held:* this was error.

FROM GIBSON.

Appeal from the Circuit Court. G. B. BLACK, Judge.

ATTORNEY-GENERAL HEISKELL for the State.

W. A. COOPER for Phelan.

FREEMAN, J., delivered the opinion of the court.

A *nolle prosequi* was entered at one term of the court under a mistake. During that term, in the absence of the defendant, this was set aside, and the case reinstated on the docket. At next term the defendants moved to set aside the order reinstating the cause, which was done. This was error. The court had no power to review its own judgment at a subsequent term of the court. It was not such action in the case as required, the presence of the defendants in court.

Reverse the case, and remand for further proceedings.

Richardson v. Brown & Lyles and Cubbins & Gunn.

1. Bills and Notes. *Usury. Contracts. Pleading and practice.* When a bill of exchange, bearing twelve per cent. interest from maturity, purports to have been made in Mississippi, where such a stipulation would be valid, the bill will not be void on its face in contracting for usurious interest, and will give the holder *prima facie* right to recover. But it may be shown by proof to be a Tennessee contract, and subject to the interest laws of this State. Such violation releases the debtor from all interest in excess of six per cent. simply.

Cases cited: Thompson v. Collins, Kellog & Co., 2 Head, 444; Senter & Co. v. Bowman, 5 Heis., 17; Branson v. Isler, 6 Hum., 279.

Code cited: T. & S., sec. 1944a.

Acts cited: Acts of 1835 and 1869–70, ch. 69.

Constitution cited: Art. XI., sec. 7.

2. Same. *Same.* Under secs. 1 and 2 of the act of 1869–70, whether the sum above the legal rate is contracted to be paid before, at the time the note falls due, or after it is due, is equally a contract for a sum of interest above the rate allowed by law, and is usurious.

FROM SHELBY.

Appeal from the Circuit Court. C. W. Heiskell, Judge.

Estes & Ellett for plaintiff.

Brown & Lyles for defendant.

Freeman, J., delivered the opinion of the court.

Plaintiff sues defendants, as endorsers, on the following bill of exchange:

$10,000. JACKSON, MISS., April 15, 1873.

Six months after date pay to the order of Messrs. Cubbins & Gunn and Brown & Lyles the sum of ten thousand dollars, value received, with interest at twelve per cent. per annum from maturity until paid.

MEMPHIS WATER COMPANY,
By JOHN CUBBINS, President.

Addressed to Toof, Phillips & Co., Memphis, Tennessee. Written across the face, "Accepted."

TOOF, PHILLIPS & Co.

Defendants plead the general issue, payment, and a special plea, denying that the bill of exchange was made at Jackson, Mississippi, as was alleged in the declaration; on the contrary, aver that it was made, endorsed, accepted, and delivered to defendants at Memphis, in the State of Tennessee, and that it was dated at Jackson, Mississippi, at request of plaintiff, and with the intent and purpose to evade and violate the laws of the State of Tennessee in relation to usury.

Plaintiff replied to this plea that the bill was made at Jackson, Mississippi, and not at Memphis, Tennessee, for the purpose of evading and violating the laws of Tennessee in relation to usury.

Upon the issues thus made the parties went to trial. It is proper to add that the declaration, averred the instrument to have been made in the State of Mississippi, and that by the laws of that State any rate of interest agreed upon in writing by the contracting parties may be charged and collected. Plaintiff sought judgment for the amount of said bill, with interest, etc.

It is conceded that the law of Mississippi is as stated. The case was tried by the court without the intervention of a jury, and a judgment rendered for defendants, from which an appeal in error is prosecuted to this court.

The decision of the court was based upon the idea that the bill of exchange sued on was void on its face, and therefore no judgment could be rendered on the same in our courts.

We must assume the fact to be, from the finding of the court, based on the testimony in the record, that the bill was made, endorsed, and delivered in Tennessee. It is true, from the letters passed between the parties, it appears that the proposition to borrow the money was made to plaintiff by letter sent to him at Jackson, Mississippi, but there was no completion of the contract by such letters. They but opened the negotiations; the contract, as well as the bill, was made in the city of Memphis, the precise terms of the contract not being definitely settled by the letters referred to, but evidently agreed on after Richardson came to Memphis about the business.

On this state of facts the question is, whether the judgment of his honor, the circuit judge, can be sustained?

It may be remarked, that the place of the date of the bill, with the averments of the declaration, was made in the State of Mississippi, where the parties could contract for any sum as interest they might agree upon, and gave the plaintiff a *prima facie* right to recover, under the doctrine of the cases of *Thomp-*

son v. *Collins, Kellogg & Co.*, 2 Head, 444, and *Senter & Co.* v. *Booman*, 5 Heis., 17.

This being so, it seems clear the bill was not void on its face for illegality in contracting for usurious interest. Had it been so, there was no necessity to raise the question by plea of facts showing the illegality, that is, that it was made in the State of Tennessee. Had this not been done, or the proof had not shown on the trial under the general issue, which probably might have been done, that the bill was a Tennessee contract, we take it, under the decisions cited, plaintiff would have been entitled to a judgment, on production before the court of his bill, with liability of the parties fixed according to law, as was done in the case. It is true Judge Caruthers, in his argument, 2 Head, 444, says: "If the note in that case was shown to have been made in Tennessee (if purporting to have been at St. Louis), it would be illegal on its face, and the plaintiff would be repelled from our courts." But this language is to be understood in connection with the question before him, and not literally. It could not mean that the note was void on its face by reason of its stipulation for interest at ten per cent., because the fact that it was made in Tennessee should be shown in proof, as this proof could not be held to be placed in the face of the note when made. He only meant that when proof should be made of the fact that it was a Tennessee contract, then the stipulation for the ten per cent. interest in connection with this proof rendered it void, by reason of this stipulation, and so evidently was the holding of the court in that case.

The question then is, whether a party can recover who sues on a bill, the illegality of the promise contained therein not appearing on its face, but shown under a plea and proof under the law of this State as it stood at the time of making this contract, and if so, to what extent?

It is conceded that, since the case of *Brunson* v. *Isler*, 6 Hum., 277, decided in 1845, and repeatedly recognized since, the rule has been settled in this State that where a party sues on a note or contract, on its face usurious, there can be no recovery. We need not stop here to criticise the soundness of this rule, as we do not have that question now before us. We only remark here, that logically, and on general principles, on the ground of illegality of the contract, the result would equally follow, whether shown on the face of the paper, or by plea and proof *aliunde*, no other rule being prescribed by statute.

We assume it to have been settled by the case of *Thompson* v. *Kellogg & Co.*, and *Senter & Co.* v. *Bowman*, that under our law as it then stood, where the illegality appeared, or could be made to appear, under plea and proof in cases like the present, then no recovery could be had, because of the fact thus shown. The court so held unquestionably, whether correctly or not we need not discuss. This was under the act of 1835.

In the view we take of this case, it is unnecessay to go into several questions of interest pressed upon our attention in the learned argument of counsel. The question of usury is one regulated by statute in our

State. By the Constitution of 1870, art. XI., sec. 7, it is provided: "The Legislature shall fix the rate of interest, and the rate so established shall be equal and uniform throughout the State; but the Legislature may provide for a conventional rate of interest, not to exceed ten per cent. per annum."

In pursuance of this provision of the Constitution the Legislature, by the act of 1869–70, ch. 69, T. & S. Code, sec. 1944*a*, and succeeding sections, regulated this question of a conventional rate of interest. The first section allowed parties to contract for interest not exceeding the rate of ten per cent. per annum, expressing the terms of the contract in the face of the instrument. The second provided that six per cent. should be the uniform rate of interest throughout the State, unless a different rate was agreed on by the parties, and reduced to writing in the face of the contract, as provided in the previous section. The third provided the penalty for violation of the provisions of the act by enacting: "If any person or persons shall violate the provisions of this act, and shall contract for a greater rate of interest than ten per cent. per annum, as herein provided, it shall be unlawful, and shall operate as a release of the debtor from all interest in excess of six per cent.; and if the same has been paid, it may be sued for and recovered by the party paying the same, or his heirs, personal representatives, or creditors.

We think it beyond question, this statute must be held to control in this case. Its object is to regulate the question of conventional interest in this State.

It does so by its provisions completely. The case before us is a contract made in Tennessee while this law was in force. It is a case of conventional interest, agreed on by the parties, and the rate placed in the face of the writing. It is shown to be such a contract by the defendants themselves under their plea. The statute, then, is definite and clear, that in each case of violation of its provisions, that is, by contracting for a larger per cent. than is allowed, such violation shall operate as a release of the debtor or debtors from all interest in excess of six per cent. This violation appears in this case, and the release follows; but this is all that does follow in the way of forfeiture by the terms of the statute. To hold that no recovery could be had for the principal, and six per cent. interest, would be to add to the statute, in addition to the release of the amount above, six per cent., the penalty of forfeiture of the whole debt, thus making the law, not enforcing that which has been made.

It is, however, earnestly insisted that the stipulation for interest being for twelve per cent. after maturity is not usurious, but is only in the nature of a penalty, for which numerous authorities are cited. We do not deem it necessary to go into an examination of these authorities in this case. Whether sound on principle or not is not important to us, as the question of what is usury is one well defined in our statute. Sec. 1943 of the Code is: "Interest is the compensation which may be demanded by the lender from the borrower, or creditor from the debtor, for the use of money."

By the next section it is provided that six per cent. per annum shall be the rate, and any excess over that rate shall be usury. The same principle is found in the act of 1869–70, sections 2 and 3. Under these provisions it is clear that whether the sum above the legal rate is contracted to be paid before, at the time the note or bill falls due, or after it is due, it is equally a contract for a sum as interest above the rate allowed by law, and is usurious. What difference can it make in the essence of the transaction that the excessive rate shall be agreed to be paid for one period rather than another? Is it not equally the compensation demanded by the lender or the creditor for the use of his money? We think it is, most certainly. The fact that the party might relieve himself from this payment by payment of the bill at the day agreed upon for its falling due, only prevents other contracts from being enforced against him; but if he for any cause failed to pay, then the interest at the rate contracted becomes due by virtue of the agreement, is paid as interest for the continued use of the money, and is contrary to the requirements of the law.

We therefore hold, the court below erred in not rendering judgment for the amount of the bill, with six per cent. interest, and proceeding to render the proper judgment, direct one in accordance with this opinion.

WATKINS v. WYATT.

PROPERTY NOT IN ESSE. *Is the subject of a valid mortgage.* A crop yet to be planted is the subject of a valid mortgage. Such an assignment is held by the court to be lawful.

FROM DYER.

Appeal from the Circuit Court. GIDEON B. BLACK, Judge.

RICHARDSON & WATKINS for plaintiff.

LATTA & MARSHALL for defendant.

SNEED, J., delivered the opinion of the court.

The agreed case shows that the plaintiff agreed to furnish one Houston McCain with supplies, on condition that McCain, who was a farmer, should execute to the plaintiff a mortgage of his cotton crop for the then current year (1875) as a security for the supplies so furnished. A deed of trust to that effect was accordingly executed in February, 1875, "upon a crop of cotton to be planted and grown upon the land of the said McCain in the year 1875, to secure said Wyatt for supplies furnished and to be furnished to said McCain, to enable him to make said crop." This deed of trust was duly registered. When the crop matured, and became subject to levy, the defendant Watkins having recovered a judgment against McCain

for the sum of $42.95 before the execution of the deed, caused an execution to be levied on enough of the cotton to discharge his debt; and this action was brought to determine who has the better right. The question presented is, whether a crop of cotton yet to be planted is the subject of a valid mortgage; and the adjudged cases seem to be very much in conflict on the subject. A humane policy would seem to favor the affirmative of the proposition; as, if such is the law, the indigent farmer may obtain credit upon his prospects, and be enabled to subsist his family pending the cultivation of his crop. The case of *Grantham* v. *Hawley*, reported by Sir Henry Hobart in the reign of James I., is one of the earliest upon the subject, and has been frequently cited in support of the doctrine that a thing not *in esse* may be the subject of a valid chattel mortgage. The case, as cited, was as follows: A man seized of land let the same by indenture for twenty-one years, and covenanted that it should be lawful for the lessee, his executors and assigns, to carry away to his own use *such corn as should be growing* upon the ground at the end of the term; and afterwards the lessor released his reversion; and one question was, whether the lessee was entitled to corn so growing; and it was argued, on the part of the assignee of the reversion, that it was merely contingent whether there should be corn growing upon the ground at the end of the term or not, and that the lessor never had property in the corn; and, therefore, could not give or grant it; for the right to the corn standing at the end of the term being certain,

accrued with the land to the lessor. But judgment was given against the reversion, because it was said that the property, and very right of the corn when it came into being, was passed away, for this was both a covenant and a grant; and, therefore, if it had been of natural fruits, as of grass or hay, which run merely with the land, the like grant would have carried them in property after the term. Then, though corn were *fructus industrialis*, so that he that sowed it might seem to have a kind of property *ipso facto* in it, divided from the land, and, therefore, it would go to the executor, and not to the heir; yet, in this case, all the color the reversioner had to it was by the land which he claimed from the lessor who gave the corn; and though the lessor had not the corn actually in him, nor certain, yet he had it potentially, for the land was the mother and root of the fruits. Therefore he that had that, might grant all fruits that might arise upon it afterwards, and the property would pass as soon as the fruits were extant." Hob., 132; 1 Pow. Con., 157, 158, 2 Walp. Ed.

When stripped of all quaintness of verbiage, the plain doctrine of this old case is, that he who owns the soil may sell or assign the crops to be grown upon it. It is said in Benj. on Sales, that in relation to things not yet in existence, or not yet belonging to the vendor, the law considers them as divided into two classes, one of which may be sold, while the other can only be the subject of an agreement to sell—of an executory contract. Things not yet existing which may be sold, are those which are the natural

product, or expected increase, of something already belonging to the vendor. A man may sell the crop of hay to be grown on his field, the wool to be clipped from his sheep at a future time, the milk his cow will yield in the coming month, and the sale is valid. But he can only make a valid agreement—not an actual sale—where the subject of the contract is to be something to be afterwards acquired; as the wool of any sheep or the milk of any cows that he may buy within the year, or any goods to which he may obtain title within the next six months. Benj. on Sales, sec. 78. The precise point now in judgment, however, has been adjudged against the proposition, that a thing not *in esse* is the subject of a valid sale or mortgage. Thus, it was held in *Hutchinson* v. *Ford*, 9 Bush., 318, where this exact question was involved, that "a mortgage of a crop to be raised on a farm during a certain term, but which is not yet sown, passes no title, and the mortgagee has no claim against a purchaser of a crop for it, or its value." *Everman* v. *Robb*, 3 Cent. L. J., 735; *Ofin* v. *Sill*, 8 Wend., 111; *Lunn* v. *Thornton*, 1 Man., Gran. & Scott, 379; *Barnard* v. *Eaton*, 2 Cush., 295; *Bank of Lansingburg* v. *Cary*, 1 Barb., 542; *Comstock* v. *Scales*, 7 Wisc., 159; *Redd & Co.* v. *Burrus & Williams*, MSS. Geo., 1877.

Many other authorities might be cited to the same effect, and quite as many that look in the other direction. *Andrew* v. *Newcomb*, 32 N. Y., 417; 3 Law Reg., 19–33; 17 Con., 114; *Holroyd* v. *Marshall*, 10 House of Lords Cases,1 89; 18 Pick., 168; 14 Pick., 497; 10 Met., 481; 12 Cush., 376; *Brett* v. *Carter*,

Cent. L. J., May 5, 1876; 32 New Hamp., 484; 18 Verm., 465; 1 McCaslin's Ch. Rep., 408; 24 Wisc., 551; 26 Ill., 121; 48 Ala., 109; *Butt* v. *Ellett*, 19 Wall., 544; 42 N. Y., 620.

In one of these cases, it is said: "In the case of crops to be sown, it vests potentially from the time of the executory bargain, and actually as soon as the subject arises." *Andrews* v. *Newcomb*, 32 N. Y. Rep., 417. Mr. Story says that rights in remainder and reversion, possibilities coupled with an interest, rents, franchises and choses in action, are capable of being mortgaged. E. g., per sec. 1021. A court of equity, he says, will support assignments, not only of choses in action, and of contingent interests and expectations, but also of things which have no present, actual, or potential existence, but rest in mere possibility; not, indeed, as a present positive transfer operative *in præsenti*, (for that can only be of a thing *in esse*), but as a present contract, to take effect and attach as soon as the thing comes *in esse*. E. g., per sec. 1040. Among the examples he cites, is that of the assignment of the head-matter and whale-oil to be caught in a whaling voyage now in progress. The right will attach to the head-matter and whale-oil when attained. *Id.* So strongly are courts of equity inclined to uphold assignments when *bona fide* made, that even the assignments of freight, to be earned in the future, is good in equity, and will be enforced against the party from whom it becomes due. *Id.*, sec. 1055. In Story on Sales, it is said, "While a person cannot make a present sale of all the wool there may be on a sheep,

which he may hereafter buy, nor any other thing in which his interest is wholly prospective and doubtful, there may be a valid sale of the wine a vineyard is expected to produce, or the grain a field is expected to grow, the milk of a cow for the next year, or the future young of animals." Story on Sales, sec. 183; *McCarty* v. *Blivens*, 5 Reg., 196. Whatever is the subject of a valid sale is, of course, the subject of a valid mortgage. A man may sell or mortgage everything that is his property; and such a sale, if *bona fide*, will be upheld in law and equity. Property is the right and interest a man has in lands and chattels to the exclusion of others. 17 Johns, 283; 11 East, 290; 4 Pet., 511. All property, real or personal, corporeal or incorporeal, movable or immovable, may be the subject of mortgage. 1 Hill on Mort., 6. Things are said to have a potential existence when they are the natural product, or expected increase, of something already belonging to the vendor. *Low* v. *Pew*, 11 Am. Rep., 357. The term incorporeal properly includes all legal rights. The right in the proprietor of the soil to plant, cultivate and gather his crops, to the exclusion of all others, is an absolute legal right, and an incorporeal property; and incorporeal property is as well the subject of valid sale and mortgage as any other kind of property. The mortgagor, in this case, was the proprietor of the land on which he proposed to raise the crop in controversy. The crop had a potential existence because it was to be the natural product and expected increase of the land then owned and occupied by him. Why may he not

obtain the credit necessary to make the crop by executing a mortgage upon it? We see no sound reason why. Who is to be injured by it if the transaction is *bona fide*, and there is no superior lien for rent or otherwise? Who is to be misled by it if the transaction is at once published to the world by registration, as was done here? If the merchant is willing to furnish him with supplies, and enable him to make the crop, and take the risk of the crop itself for security, who has a right to complain, and where is the *mala fides* of the transaction? Is there any doubt that a court of equity would sustain the mortgage, in such a transaction? Then, wherefore must he fail in a court of law, into which forum the parties have brought the case, and where our liberal statute requires that, in such a case, their rights shall be adjusted upon equitable principles? In the case of *Andrews* v. *Newcomb*, above cited, it is said that, as long ago as the time of Ch. J. Hobart, it was held that one proposing to plant crops might convey them in advance, and that the fruits which should arise afterwards, would pass as soon as they were extant; citing Hob., 132; 3 Johns, 216, and *Hare* v. *Celay*, Cro. Eliz., 143. Crops to be raised, say the court, are an exception to the general rule; that title to property not in existence cannot be affected so as to vest the title when it comes into being. In the case of crops to be sown, it vests potentially from the time of the executory bargain, and actually as soon as the subject arises. 32 N. Y. Rep., 421. The judgment, in this case, certainly created no lien upon the crop, which the

statute protected from levy until after maturity. The judgment debtor had failed with his title, and the judgment creditor could stand on no higher ground than his debtor. We hold the assignment to be lawful and valid, and that the plaintiff below has the better right to the fund in controversy.

Affirm the judgment.

JACKSON, ... APRIL TERM, 1878.

NICHOLSON *v.* THE STATE.

CRIMINAL LAW. *Misdemeanor. Attempted felony.* An attempt to commit a felony, as larceny, is, at common law, punishable as a misdemeanor.

Code cited: Section 4630.

FROM SHELBY.

Appeal from the Criminal Court. T. H. LOGWOOD, Judge.

J. G. CROOKHAM for plaintiff.

ATTORNEY-GENERAL HEISKELL for the State.

FREEMAN, J., delivered the opinion of the court.

This is an indictment for attempting to steal from the kitchen of one McDowell. The defendant was convicted of a misdemeanor, and was fined ten dollars by the court below. The facts are, that late in the evening, the kitchen window being open, defendant entered at the window, but happened to be seen by some one on the premises, who notified McDowell of the fact. McDowell started immediately to the kitchen, through his dwelling-house; as he got to the kitchen, defendant leaped out of the window and fled, was pursued some distance and caught; denies that he was

in the house for purposes of theft, and did not in fact take or disturb anything. It is now insisted that no felony is shown or attempt to commit one; that section 4630, providing for punishment as felonies attempts to commit felonies, had been held by this court to apply to cases of felonies attempted on the person, and did not include attempts to commit offenses against property. Such was the holding of this court in the case of *State* v. *Jones*, December term, 1871. If we adhere to that holding, the party cannot be held liable under this section, nor be convicted of a felony. But he was only convicted of a misdemeanor. The attempt to commit a felony, was and is a misdemeanor at common law, and even the *attempt* to commit a misdemeanor has been held in many cases a misdemeanor. See Russell Cr. Law, vol. 1, p. 46, and notes. This being so, treating the indictment as charging such an attempt, it would sufficiently charge the misdemeanor with which he is convicted. The jury have found the attempt was to steal, and we cannot say they are not correct. Entering at the window instead of the door, indicates anything but an honest purpose; the hasty and rapid flight on the approach of McDowell, strengthens and confirms this view to such an extent, that we do not feel authorized to say the jury have not correctly reasoned from the testimony, as to the intention of the defendant.

Let the judgment be affirmed.

Z. G. JACKSON *v.* THOS. J. STOCKARD.

PLEADING AND PRACTICE. *Replevin will not lie. When. Action.* The action of replevin does not lie to recover part of a chattel.

FROM GIBSON.

Appeal from the Law Court. G. B. BLACK, Judge.

McFARLAND & BOBBITT for plaintiff.

W. M. McCALL and H. T. JOHNSON & BRO. for defendant.

SNEED, J., delivered the opinion of the court.

This was an action of replevin for three-fourths of three bales of cotton. Verdict and judgment below were for the defendant. The record shows that the defendant entered a motion to grant the proceedings and discuss the case upon the ground that the action would not lie in such a case. It does not appear that the court took any further notice of this motion. The remedy by action of replevin was given to recover the whole and not an undivided part of a specific chattel, and it has several times been held that it does not lie to recover part of a chattel claimed jointly by plaintiff and defendant, where there has been no severance of the joint ownership.

It resulted that, and from all other questions upon this point, the judgment is right, and the same must be affirmed, and the case dismissed.

WILLIAM POTEETE v. THE STATE.

1. CRIMINAL LAW. *Bail. Surety. Clerk's power to arrest defendant.* A clerk of the court is not authorized to direct the arrest of a defendant where he has been released on giving security, or to direct his imprisonment in the county jail as a means of collecting a judgment rendered against him and his surety.

   Code cited: Sections 5166, 5329.

2. SAME. *Resisting arrest. Office and officers.* A *mittimus* issued by the clerk of a court improperly and in violation of law, and directing the sheriff to arrest and imprison the party named, will not justify the officer in attempting to make such arrest; and the resistance of the party by killing the officer does not amount to murder. The officer must at his peril see that he has valid process in his hands to authorize an arrest.

3. SAME. *Evidence. Severance. Competent witness.* A party jointly indicted for the same offense, but who has obtained a severance, and is not put on joint trial, is a competent witness for defendant.

   Cases cited: Delozier v. State, 1 Head, 46; Rice v. State, 1 Yer., 432.

4. SAME. *Same. Dying declarations.* The dying declarations of a witness to a homicide are not admissible in evidence. Only such are admissible as are made by him for whose homicide the prisoner is on trial.

   Case cited: Hudson v. The State, 3 Col., 359.

FROM MADISON.

Appeal from the Law Court. H. W. McCORRY, Judge.

S. W. HAWKINS, J. R. HAWKINS and M. M. BRIGHT for plaintiff.

ATTORNEY-GENERAL HEISKELL for the State.

FREEMAN, J. delivered the opinion of the court.

Poteete was indicted and convicted in the common law and chancery court of Madison county, for killing Jason Fussell, a deputy sheriff, in March, 1877. The jury found him guilty of murder in the second degree, and fixed his punishment in the penitentiary for sixteen years. Motions for a new trial and arrest of judgment were made, and overruled, and appeal in error to this court. Several questions are presented in argument on which reversal of this judgment is asked, which we proceed to notice, so far as may be necessary for the decision of the case before us. A short statement of facts will serve to show the bearing of the questions to be decided.

It seems that the defendant, together with his two brothers, John and Levi Poteete, had been convicted, and fines imposed on them, for the offense of carrying pistols in violation of law. They gave their father, Andrew Poteete, as surety for payment of these fines and the costs of the prosecutions; and on these judgments executions were issued by the clerk, and placed in the hands of Perkins, sheriff, who is assumed to have put them in the hands of Fussell, the deceased, for collection. On the back of these executions, which are in the usual form, is endorsed the fact that they are "alias" executions. In addition to the above process, we find on the other side of them, what is entitled a "*mittimus*," which commands the sheriff to take the body of the parties and safely keep them in custody n the county jail, until the amount of the judgments in.

each case shall be paid. This process is signed by the clerk of the court, and in fact is issued without any order or judgment of the court whatever, so far as we can gather from the record. In addition to the above papers, there had been issued to the sheriff a capias against the body of Jno. Poteete, one of the brothers, for a misdemeanor in carrying a pistol, based on a presentment therefor, made by the grand jury of Madison county. This process is also assumed to have been in the hands of the deceased deputy sheriff, Fussell. It appears that about the third day of March, 1877, Fussell went to the house of Andrew Poteete, the father, accompanied by his nephews, William and John Anderson, who had been summoned by him as a *posse*, to assist him in arresting the parties named. Without detailing the circumstances attending the transaction, it suffices at present to say, that Fussell assumed to arrest the three sons, and it is equally clear, that in doing so, he assumed to arrest them all then by virtue of the process to which we have referred. It may further be assumed, that, as he had a capias, or is claimed to have had one, against John Poteete, that his individual arrest was probably by virtue of that—at any rate, for the purposes of this opinion, may be assigned to that process. This, however, as a matter of course, could be no authority for the arrest of the defendant on trial, and we are compelled to decide the question as to the effect of these so-called *mitimuses*, in the hands of the deputy sheriff, as conferring no authority on him to arrest and detain the defendant in custody. We need but say here,

that the parties having been charged only with a misdemeanor, and that not committed in the presence of the officer, he could not arrest them without process of law authorizing such act, and to do so without this, would be a trespass, a wrong of greater or less degree, dependent on the attendant circumstances in the particular case.

On the subject of the authority of the deputy sheriff to make the arrest, his honor below charged the jury substantially, that if Fussell went to the house where the prisoner and the other persons named as defendants in such *precepts* were, for the purpose of apprehending them, such act on the part of Fussell and those with him was a lawful act, and if he informed them and the others of his purpose, and commanded them to submit to arrest, and they made no question upon the authority or the precepts, but apparently submitted to the arrest, and acted so as to induce Fussell to believe that they did not desire or care that the precepts be exhibited, it was not necessary that he should exhibit them, and the parties under such circumstances would have been under lawful arrest, and it was unlawful in them by any means to resist him; and if, after such submission, the prisoner, for the purpose of escaping, deliberately or premeditatedly shot at and killed the said Fussell, he is guilty of murder in the first degree.

It is obvious from this extract, taken as a whole, that his honor assumed the validity of the precepts we have referred to, as giving authority to Fussell to arrest the defendant, and in fact all the parties against

whom he had such precepts. He makes no distinction between the case of John Poteete, against whom the capias issued, and the other parties against whom, at most, he had no precept, except the so-called *mittimus*. We must decide the question, then, whether there were legal and valid precepts, which conferred authority on the officer to arrest the defendant. While we would go far towards justifying an officer in the *bona fide* performance of his official duty, in obedience to an apparent warrant issued by a proper officer, and would hold, that no mere technical or formal objection should be allowed to prevent his being shielded from the charge of an unauthorized aggression, yet, on the other hand, we must remember, that the rights and liberties of a citizen can only be invaded by due process of law. In view of these considerations, as well as long settled principles, we are compelled to hold that, if the precept in the hands of the officer be unauthorized by law, not issued by authority of an officer authorized to issue it, he attempts to execute it at his peril. Mr. Greenleaf, vol. 3, sec. 123, lays down the rule as follows: "Thus, the killing will be reduced to manslaughter, if it be shown in evidence that it was done in the act of protecting the slayer against an arrest by an officer acting beyond the limits of his precinct, or by a warrant essentially defective in describing either the person accused or the offense—or when the party was, on any other ground, not legally liable to be arrested or imprisoned."

While we perhaps might not go to the full extent of the doctrine here stated, as to objections to the

warrant for want of description of the person or the offense, still it is evident we could not fail to go as far as we have stated, consistent with authority and sound principle; that is, that the precept held by the officer must be issued by one authorized by law, and must be a legally authorized process, empowering the party to take and imprison the party, or else it cannot justify the act on the part of the officer. This must be so on sound principle. For, assuming that a process is necessary in order to legal action, it can only be such process when issued by and in accordance with the authority conferred by law. To hold otherwise, would be to assume that for this purpose an unauthorized precept would be as effective as one directed by the law of the land. It will not do to say that it is hard to impose on a mere ministerial officer the duty of deciding upon the validity in law of the process issued to him. This must be done, as to the matter indicated, by some one, and as an officer of the law he may be assumed to have better means of doing so than the citizen who is to be arrested. At any rate, we see no great hardship in the rule we have laid down as applicable to this case, that the officer must see that he has a process in his hands, issued by authority of law, and by an officer authorized to give him such a mandate. In view of these principles, we must test the correctness of the charge of his honor. It clearly appears, that the party had been convicted and fined by the court. By sec. 5329 of the Code, it is provided, "that where a fine is imposed, the court may allow the defendant to confess

judgment for the fine and costs, with good sureties." By the next section it is provided, "if the fine and costs are not paid, or the judgment confessed, as provided in the preceding section, the defendant shall be imprisoned until the fine and costs are paid, or he is otherwise discharged by law. It is then provided, the clerk shall issue execution for the fine and costs, or any portion of the same remaining unpaid, as in civil cases. These sections clearly mean, that if the defendant gives the sureties as required, he shall not be imprisoned, and that the sureties stand in the place of personal confinement as a means of enforcing the collection of the penalty imposed, and the party discharged from custody; and such has been the uniform practice in our courts. This being so, the judgment of the court was proper, that execution should issue against the defendants and surety to collect the amount thus secured. But we can see no statute or rule of law, by which the clerk is authorized, notwithstanding the party has been released on giving surety, to direct his arrest and imprisonment in the county jail as a means of collecting the judgment rendered against him and his surety. What might be the power of the court when it had been legally shown that insufficient or insolvent security had been given, or whether the court might not treat insufficient security as no security, and thereupon order the defendant rearrested, and held until he gave good and sufficient sureties, or was discharged according to law, we do not determine. In cases of bail, it would seem some such doctrine is laid down by the authorities, cited in note to sec. 5166

of the Code. But this has no application to the case now before us. We are compelled to hold, that the clerk had no authority to issue the *mittimus* in this case, and that being issued without authority of law, and by an officer not having authority to direct the arrest and imprisonment of the defendant, such process could not give the protection of legal process to the officer attempting to execute it, and in so holding his honor erred.

There are other questions proper to be decided, as the case will go back for another trial, and they will likely be presented again. First, whether Levi Poteete was a competent witness for defendant, he being jointly indicted with him for the same offense, but having been permitted to sever before the trial, and therefore not on trial with him. On this question, we concede, on the general current of authority, the competency of the witness. We find, however, this principle cited in Philips on Evidence, with a *quere*, as to its soundness, based on the suggestion that the attorney-general might, by jointly indicting material witnesses, withhold evidence from the defendants. In fact, it is pretty clear that the rule was, probably, originally transferred inadvertently into the criminal law, by analogy with the common law technical rule, that no party to the record should be a witness in the cause. It is thus referred to in a case of our own as a technical rule in 1 Yer., 432; see also, 1 Phil. on Ev., 89, notes. In the case of *Delozier* v. *The State*, 1 Head, 46, where a party jointly indicted and found guilty, was offered as witness on the trial

of the other party, and rejected by the court below, this court, reversing the judgment, said: "Although there is some conflict of opinion upon the point, it is difficult to perceive any sound reason why, in a case like the present, one of several defendants, jointly indicted, but tried separately, should be held incompetent as a witness, either before or after trial and conviction, for a co-defendant. His relation to the trial may justly affect his credibility more or less, according to the circumstances of the particular case; but we are at a loss to see any just ground upon which he should be excluded as positively incompetent." In fact, none exists, except in the mere technical rule to which we have referred. The result of the trial can have no influence on his own case, nor can the record be used as evidence either for or against the witness. Why should he be held incompetent? It is conceded by the attorney-general that this court has held the wife of such a party competent, and this stands on precisely the same principle.

In view of these authorities, we agree with the opinion cited, and hold the witness competent; this rule being the only one standing on any sound legal principle, so far as we are able to see, and the one generally recognized as settled, since the above decision in our State.

The next question is, whether it was proper to allow the dying declaration of Jno. Poteete, who was engaged in the difficulty, and was killed by a shot from one of the Andersons, to the effect, that he fired but one shot, thus tending to fix the killing of Fus-

sell on the defendant or his brother, as he received several fatal shots from some of the parties. We find the authorities are contradictory on this question, the earlier cases allowing such testimony, even in civil cases, as the dying declarations of a subscribing witness to a bond or a will that the papers were forged. See Phil. on Ev., vol. 1, top p. 232, also notes. This has long been overruled, and the author says, p. 233: "That dying declarations have been limited even in criminal cases; and the rule is now, that such declarations are generally admissible only where the death of the declarant is the subject of inquiry, and where the circumstances of his death are the subject of his dying declarations." The learned editors of Philips, in note to the above, says that so long as such testimony stood on the idea alone that the situation of the party, as near dissolution, was equivalent to the obligation of an oath, no reason could be given why such declarations should not be received in other cases as well as that of homicide. But he adds, "on the whole, it is plain, that the rule is one of policy and necessity arising in the particular case. It shall not be allowed to the offender to commit a homicide, and by the same act put to silence the only witness at whose mouth he may be condemned." He then adds: "Upon this view it has long been settled, by a series of cases, that declarations *in extremis* are restricted to the trial for the identical homicide which occasioned the death of the person who makes the declaration."

This court, in the case of *Hudson* v. *The State*, 3

Col., 359, approve this as the rule. Upon careful reflection we can see no reason to depart from it, nor why any extension of the rule should be made. Such testimony is subject to many objections and inherent infirmities. The party is not in condition, frequently, to give calm attention to the question to which he makes his statement. It is usually made in the presence of friends whose feelings are excited against the other party against whom they are to be used, and who may easily direct the dying man's attention to the points in the case bearing most heavily on the guilt of the accused, and who will most naturally leave out of view all that tend to a different view. The accused is not present, and has neither an opportunity to make suggestions or call attention to the circumstances in his favor, nor to cross-examine to show inaccuracies of memory, or expose bias from passion or prejudice.

In view of these considerations, we are satisfied the rule laid down by the authorities cited is the sounder and safer one, and that the principle on which the admissibility of such testimony should mainly rest, is the one stated, of policy, and to prevent the party from depriving the State of testimony by his own murderous act. We therefore conclude, there was error in the admission of these declarations of John Poteete against the prisoner.

There are several other questions debated before us, but if they involve error, as probably some of them do, they are not likely to occur again, being questions of competency of jurors, who are alleged to have

formed and expressed opinions as to the guilt or innocence of the prisoner. For the errors of law herein discussed, the case must be reversed. We express no opinion whatever on the facts of the case, but leave them to be sifted by a future jury on the next trial; and we do not think it proper that we should, in the slightest, bias that investigation by any view we might have of the testimony found in the record. It is sufficient that we find errors of law against the prisoner. It is an imperative duty to correct them, and remand the case for a new trial, which is done.

B. ELDER *v.* JOHN FIELDER.

ACTIONS. *Replevin. Office and officers. Principal and surety. Substitution. Bond.* The substitution of the party in interest as defendant, instead of an officer, in a replevin suit, does not release the surety on the replevin bond.

Case cited: Smith v. Roby, 6 Heis., 546.
Code cited: Section 2800, *a*, *b*, *c*.

FROM GIBSON.

Appeal from the Circuit Court. G. B. BLACK, Judge.

JONES & CARTHEL for plaintiff.

HILL & COOPER for defendant.

McFARLAND, J., delivered the opinion of the court.

This action of replevin was brought by Elder against James Patterson, who as constable had attached the cotton sued for, at the instance of John Fielder. These facts being brought to the attention of the circuit judge, an order was made substituting Fielder as defendant in the place of Patterson. The trial resulted in a verdict and judgment for the defendant. The plaintiff has appealed, and H. L. Elder, the surety on the replevin bond, also brings up the case as to him by writ of error.

There is no error as to the plaintiff, B. Elder, but the question made in behalf of H. L. Elder, the surety, is that he was released of the order substituting a new defendant without his knowledge or consent. The case of *Smith* v. *Roby*, 6 Heis., 546, is relied upon. We are of opinion that there is a substantial distinction between that case and the present. In that case, after issue joined, a new defendant was substituted by consent, but whether this new defendant claimed under the same or a different title did not appear. It did not appear that the plaintiff's rights to a recovery remained the same after the substitution as before, but it was said in substance, that the plaintiff might have recovered against the first defendant, and the substitution of the new defendant, (claiming perhaps under a

different title) might have defeated the plaintiff's action. In this view the surety was held discharged. Here it fully appears that Patterson, who was sued in the first instance, was a constable, and claimed no interest in the property, except by virtue of his levy in behalf of Fielder. In such cases the statute provides for the substitution of the party at whose instance the levy is made, and the plaintiff's assent to this is not necessary as the real defendant. Act of 1859–'60, T. & S. Code, sec. 2800 *a*, *b*, *c*. It fully appears that the plaintiff's right of recovery, whatever it might have been, was in no degree changed by the substitution. But the action and the question to be tried remains in all substantial respects the same as before, the change being simply to substitute a real for a nominal defendant. We think in such a case the surety is not released.

The judgment will be affirmed.

BRINKLEY v. TOMENY *et als.* and LAWRENCE v. TOMENY AND WIFE.

DEED OF MARRIED WOMAN. *Correction of certificate. Clerk. Notary Public.* The provision of the Code for correction of a certificate of privy examination by the clerk, by making oath in open court to the truth of such correction, applies to a notary public as well as to a clerk, and the correction may be made upon the notary making the oath required, in the court of another State. It makes no difference that the correction was made after the defective probate had been asserted by the pleadings.

Code cited: Sections 2080, 2082.

FROM SHELBY.

Appeal from the Chancery Court. R. J. MORGAN, Chancellor.

WRIGHT & FOLKES and HUMES & POSTON for complainants.

PIERCE & DIX for defendants.

FREEMAN, J., delivered the opinion of the court.

The main question in this case is, whether the deed of trust acknowledged by Tomeny and wife to Mrs. Lawrence, stands before us as an effective conveyance, to convey the right of the wife to the realty therein described. It may be conceded for the present that the original acknowledgment, as shown by the certificate of the notary public who took it in the

city of New York, is defective, and that standing on that alone, the deed would not be effective. But this is claimed to have been cured by an amendment and correction of the certificate made by the notary who took it. The sections of the Code bearing on this question are the following: Section 2080 provides for unintentional omissions by the clerk, and that they shall not vitiate the acknowledgment of the substance of the authentication required by law in the certificate. The next section is, if the omission be matter of substance, the clerk, on application of either party interested, may correct such mistake or omission of words in such certificate or any such deed or other instrument. Section 2082 provides, "if any clerk omit any words in the certificate of any privy examination by him taken of a married woman, touching the execution of any deed or other instrument by her executed, he may at any time, on application of either of the parties interested, correct such error or mistake, making oath in open court to the truth of such correction."

In the case before us, the notary public before whom the acknowledgment was originally taken, makes the correction officially, and swears to his correction in open court—the court of common pleas in the city of New York. The matter of the correction being formal and regular, the only question is, whether a notary or other officer than the clerk of a court can make corrections of mistakes as provided for in the sections cited—and the additional question, as to whether it can be done in the courts of other States. The

statutes on this subject are remedial, and in purpose intended to aid a right already acquired, but defectively evidenced by a mistake of the officer whose duty it was properly to certify what had been actually done. In this view they should be most liberally construed in favor of the party whose right is sought to be set up by the correction. The terms of the statute apply to clerks alone, but we think this is met by the definitions of the Code, section 55. The term sheriff, constable, or coroner, or other word used for an executive or ministerial officer, includes any person performing the duties of such officer, either generally or in special cases. The clerk is but a ministerial officer, and a notary public is also a ministerial officer, who by law performs the duties of the clerk in taking acknowledgment of deeds in cases like the present. The term clerk may well include a notary performing the duties of the clerk in the special cases provided for. The liberal construction which we have assumed as proper in giving effect to the provisions of the Code, will well justify this construction. This being so, the correction was properly made, if it could be done before a court out of the State. On this question we feel no difficulty in saying it may so be done. It is only intended to furnish the evidence of what had actually been done—does not create a new right, but furnishes the proper proof of one already acquired, but which fails to be evidenced properly by an omission of the officer to do his duty as required by law. It would seem, that in such a case the law might well have only required him to make the correction

of his mistake under the sanctions of his official responsibility; but as a further guarantee that he shall truthfully state what is done, he is required to verify it by an affidavit taken in open court to the truth of such correction. There can be no good reason why this should not be as well done before any other court having authority to administer the oath, as in a court of our own State. We therefore hold the verification sufficient.

We need scarcely notice the other questions made, such as the fact that the correction was made after the defective probate had been asserted by pleadings in this case. We think there is nothing in this. If the right act was done at the time, it can make no difference in this case, whether the evidence of it, intended to be furnished by the correction provided for, was made at one time or the other, as between the parties themselves. The matters presented on petition for rehearing are not of such weight as to need discussion. On the whole case, we are satisfied the deed of trust is valid and binding on the *feme covert*, and should be enforced.

A decree will be drawn to this effect, with costs to be paid out of the funds arising from the sale.

CHRIS. JOHNSON v. THE STATE.

CRIMINAL LAW. *Embezzlement. What necessary to constitute. Principal and agent.* In order to sustain the charge of embezzlement, the agent, etc., must be in the regular employment of the master, and it must be by virtue of such employment that the money or property appropriated comes to his hands. A mere casual employment does not fall within the statute.

Case cited: Lambeth v. The State, MS., Jackson, 1877.

FROM SHELBY.

Appeal from the Criminal Court. T. H. LOGWOOD, Judge.

JNO. D. ADAMS for the appellant.

ATTORNEY-GENERAL HEISKELL for the State.

SNEED, J., delivered the opinion of the court.

The prisoner appeals in error from a conviction of embezzlement. The facts are, that the prisoner now and then "went on errands" for the prosecutrix, but it does not appear that he was regularly in her employment. The prisoner is a German, and does not speak or understand very well the English language. The prosecutrix sent him one day with a note to one Harrison, a neighbor. The contents of the note were not made known to the prisoner; but as a matter of

fact, the note requested Mr. Harrison to lend the prosecutrix five dollars; the note was delivered by the prisoner to Mr. Harrison, who, unseen by the prisoner, enclosed a five dollar bill in an envelope and handed it to the prisoner, to be delivered to the prosecutrix; the money was not delivered, and the prisoner on being interrogated, gave contradictory statements about it, and was arrested and indicted in one court for embezzlement, and the other for larceny. He was convicted of embezzlement.

The statute under which the conviction was had, is as follows: "Any officer, agent, or clerk of any incorporated company, or any clerk or agent of a copartnership or private person, except apprentices and other persons under the age of eighteen years, who embezzles or fraudulently converts to his own use any money or property of another, which has come to his possession, or is under his care by virtue of such employment, shall, on conviction, be punished by confinement in the penitentiary not less than five nor more than twenty years." Code, sec. 4708.

It is manifest that the facts of this case—whether they make out a case of fraudulent breach of trust or larceny—do not make out a case of embezzlement. A mere casual employment in such a case does not fall within the meaning of the statute. It was intended to protect employers against the frauds and peculations of persons in their regular employment, who *by virtue of such employment*, might come into the possession of money or property, and fraudulently appropriate the same to their own use, and not to a casual

messenger who might be entrusted with the temporary possession thereof. In Hawtin's case, 7 Car. & P., 281, it was held to be a necessary fact that the defendant received the property in the course of his employment to make a case of embezzlement. The employment referred to must be the regular employment of the defendant as an officer, agent or clerk of any incorporated company, or any clerk or agent of a copartnership, or the regular clerk or agent of any private person, as a merchant, factor, mechanic, or manufacturer, having clerks or agents in their regular employment, and it must be in virtue of and in the course of such regular employment that the money or property must come into the hands of the defendant, to bring the offense within this particular statute. *People* v. *Hennessy*, 15 Wend., 147; *People* v. *Allen*, 5 Denio, 76; *Lambeth* v. *State*, MS., Jackson, 1877.

Let the judgment be reversed and arrested, and the prisoner remanded and held for another indictment.

J. H. Duke, Trustee, v. R. W. Hall.

1. Bills and Notes. *Negotiable paper. Innocent holder.* Where an innocent holder of a note purchased the same for value before maturity, though the endorsement be unauthorized or forged, he gets a good title to the paper freed from all equities, if he had no notice of the defect in the title of the holder.

2. Same. *Deed of trust. Mortgage. Registration.* A conveyance of negotiable paper, or chose in action, by mortgage or deed of trust, need not be registered.

Cases cited: Allen v. Bain, 2 Head, 108; Mayer v. Pulliam, 2 Head, 350; Kelley v. Thompson, 2 Heis., 281.

Code cited: Sections 51, 2003–4. Act of 1881–0.

FROM MADISON.

Appeal from the Law Court. H. W. McCorry, Judge.

Caruthers & Mallory for plaintiff.

Muse & Buford for defendant.

Freeman, J., delivered the opinion of the court.

J. W. Glass made an assignment in trust for the payment of debts to Duke, September 22, 1873. After conveying certain other property, he adds: "Together with all notes taken by me for the sale of real estate which I may have on hand, or which have not legally been transferred by me, and any surplus of any notes

which I have myself legally transferred as collateral security for other just and *bona fide* debts due by me or for which I am liable." This deed was duly registered in Madison county, where it was made, on the same day it was executed. This suit is brought by the trustee to recover the possession of a note made by A. D. Hurt, on 22d April, 1873, and January 1st, 1874, payable to Allen Deberry, and by him endorsed to J. W. Glass. This note was given for real estate purchased by Deberry from Glass, and transferred to Glass before he made his assignment to plaintiff. The suit is an action of detinue to recover the note, with damages for its detention. The pleas put in issue the right of the plaintiff to recover, by a general denial of the detention, and one, that the note is not the property of the plaintiff. The real question before us is, whether the plaintiff shows himself entitled to recover the possession of the note in controversy.

The first question we notice grows out of the following assumed state of facts: This note had been placed in the safe of a son of J. W. Glass, J. E. Glass, and was under the control of John E. Glass. John E. Glass, some thirty or forty days before the assignment by his father, placed this note in the hands of Blakemore Bros. & Co., as collateral for a debt due them by the firm of which he was a member, endorsing it in the name of J. W. Glass. This endorsement is assumed to have been without authority from J. W. Glass. On 25th of September, two days after making the deed of trust, J. W. Glass gave to Blakemore

Bros. & Co. an instrument by which he acknowledged that John E. Glass did have authority to endorse the note, and fully ratified the transfer made by him. On the 27th of September, Mr. Hall, the defendant, purchased the debt of Blakemore Bros. & Co., paying full value for the same, and took the note of Hurt, which was pledged as collateral for its security. We may assume for the present that he is a purchaser of the note for value, or at any rate a holder for value. Laying aside for the present the questions as to sufficiency of the description of the note to pass Glass' interest in the same, and the effect of registration of the deed as giving constructive notice of the conveyance of the note to the trustee, what would be the rights of Hall on the above facts? The note had been transferred to Blakemore Bros. & Co., and was in their possession Assume the endorsement of J. E. Glass was unauthorized, even a forgery, it can scarcely be questioned, that if Hall purchased it for value, *without notice of defect in the title of the holder*, he would take it freed from all equities. "The *bona fide* holder can recover on the paper, and gets a good title to it, though it come to him from a party who had stolen or robbed it from the true owner, provided he took it innocently in the due course of trade, for a valuable consideration, not overdue, and under circumstances of due caution, and he need not account for his possession of it, unless suspicion is raised." 3 Kent's Com., 78–79. On these well-established principles, Hall would get an unimpeachable title to the note, unless charged with notice of the defect of title on

the part of the party from whom he purchased; and this cannot be maintained in the face of the verdict of the jury in this case, nor probably on the testimony, independent of the verdict. We are unable to see how Duke could recover against Hall; conceding, but not deciding, that the description of the note in the deed of trust is sufficient to pass the right of J. W. Glass to it, he could but stand as an assignee, in the shoes of Glass, and could stand no higher. Negotiable paper, as this is, can only be endorsed so as to convey the legal title to the endorser, by a transfer on the instrument itself, or on a paper appended thereto, know as an *allonge;* and the transfer of an note or bill by a separate writing or oral agreement, will not enable the assignee to sue in his own name, or confer any better right than that held by the assignor. See Am. L. Cases, vol. 2, pp. 228, 229, and authorities cited. This being so, it follows, if Glass himself could not have sued for the paper, Duke, his assignee under the deed of trust, would stand in no better position; the paper being out in the commercial world and not due, was liable to be validly transferred to any *bona fide* purchaser, and he get a good title.

This brings us to the question of the effect of registration of the deed, assuming, as we have said, that the description of the note is sufficient to pass the interest of Glass as assignee to the trustee. Before the Code, we consider this question was settled by the case of *Allen* v. *Bain et als.*, 2 Head, 108, and *Mayer & Co.* v. *Pulliam et als., ibid,* 350, and that such a transfer of negotiable paper or chose in action was

not required to be registered, and consequently, "the fact of registration did not operate as notice." We have followed this view in the case of *Kelley, Exr*, v. *Thompson*, 2 Heis., 281, since the Code, saying there was but little difference between the act of 1831 and 1839 and the Code, and no difference in their meaning. It is probably true the precise point now made was not then suggested, based on the definitions of the Code, sec. 51, that the words "personal property includes slaves, money, goods, chattels, things in action, and evidences of debt;" yet, conceding the difficulty presented when taken in connection with our general registration laws, still we think sections 2003 and 2004 of the Code are conclusive of this aspect of the case. The first section found in a chapter entitled "Of Personal Property," provides, "all mortgages and trusts of personalty shall be in writing, and proved and registered as hereinafter provided, to be valid against the creditors of the bargainer or purchaser under him for value, and without notice." The next section is, "the provisions of the foregoing section do not apply to choses in action;" that is, a mortgage or deed of trust of these need not be registered, and are thus excepted out of the general provision on the subject. Registration, therefore, not being required as to choses in action, can have no effect as notice of the title thus acquired, that is by mortgage or deed of trust.

As to the question of the sufficiency of the description of this note to give notice of its transfer by registration, we need express no definite opinion on the subject, as the decision of the question as to no-

cessity and effect of registration above, renders the question unimportant, and we do not decide it.

It might be thought, from the rule we have cited, that the legal title to negotiable paper does not pass to the assignee except by endorsement on the paper, or appended to it, that the plaintiff would not be entitled to sue for the note in any way. But we take it, the distinction is between suing for the paper, and the right to sue upon it in the name of the assignee; suing for it in detinue, would depend on the right to possession of the paper; suing on the paper, depends on the legal transfer in such form as to vest the legal title in it, by the law merchant.

On the whole case, we are satisfied with the verdict and judgment of the court below, and affirm the same.

THE STATE *v.* BEN. DEGRAFFENREID and JNO. ATKINS.

CRIMINAL LAW. *Burglary. Larceny.* A conviction for burglary with intent to commit larceny, is a bar to an indictment for commission of the larceny.

FROM SHELBY.

Appeal from the Bartlett Circuit Court. J. E. R. RAY, Judge.

ATTORNEY-GENERAL HEISKELL for the State.

C. R. BARTEAU and W. WALLACE for defendants.

DEADERICK, C. J., delivered the opinion of the Court.

This was an indictment for larceny. The defendants pleaded former conviction, upon an indictment for burglary, with intent to commit larceny, and judgment of three years' confinement in the penitentiary, and that said judgment remains in full force and effect, and not reversed or made void; and that said larceny charged in the case, upon which they were convicted, is the same upon which they are now charged, etc. To this plea the State replied, admitting the truth of the facts pleaded. To this replication defendants demurred.

The facts pleaded are admitted by the State, and the question presented is, can the State, at the election of her attorney-general, make two offenses out of one and the same transaction? There are cases holding the affirmative of this proposition. In 1 Bish. Cr. Law, sec. 893, an Indiana case is cited as sustaining the proposition that an acquittal of burglary with intent to commit a larceny, is no bar to a subse-prosecution for the actual commission of the larceny; and a Connecticut case holding that a conviction for larceny is no bar to an indictment for burglary with intent to commit the larceny. But C. Justice Waite says, in dissenting opinion: "I take it to be a sound rule of law, founded upon the plainest principles of natural justice, that where a criminal act has been

committed, every part of which may be alleged in a single count of the indictment, and proved under it, the act cannot be split into several distinct crimes, and a separate indictment sustained on each; and whenever there has been a conviction on one part, it will operate as a bar to any subsequent proceedings as to the residue." And again he says: "Whenever in any criminal transaction, a felonious intent is essential to render it a crime, and without proof of which no conviction can be had, two informations founded upon the same intent cannot be maintained."

We think this reasoning is sound, in burglary with intent to commit larceny; and in larceny itself, it is essential that the felonious intent should be proved; and it is this intent, which is the same in both cases, that constitutes a material element of crime in each; and when punished in one case, it would be to punish twice for one offense, if on a subsequent trial and conviction, an essential part of the criminal act first punished, also constituted an essential part of the criminal act last punished. For an assault a party may be indicted, so he may be for a battery; but a conviction for an assault bars a conviction for the battery, as the assault is an essential element in the battery, and part of it. In North Carolina and in Georgia, it has been held, that where on an indictment for burglary with intent to commit a larceny, a conviction has been had, a conviction for the actual larceny, being the same transaction, cannot be maintained. And this we think the better and sounder rule.

Richardson *v.* Rice, Stix & Cd.

The circuit judge sustained defendants' demurrer to the replication of the attorney-general to his plea, and sustained the plea of former conviction and discharged the defendants from this prosecution, and we affirm the judgment.

W. B. & H. H. RICHARDSON *v.* RICE, STIX & CO., for use, etc.

BILLS AND NOTES. *Principal and surety. Negotiable paper transferred as collateral security.* Negotiable paper transferred as collateral security, for subsisting indebtedness and future advances, is subject to all equities then existing, and the maker is protected if he has paid the note to the rightful holder before the transfer, though the transfer was before maturity.

Cases cited: Gosling *v.* Griffin, MS., Nov., 1864; Vatterlien *v.* Howell, 5 Sneed, 441. These cases reviewed.

FROM CROCKETT.

Appeal from the Circuit Court. G. B. BLACK, Judge.

W. F. POSTON for plaintiffs.

H. T. JOHNSON for defendants.

DEADERICK, C. J., delivered the opinion of the court.

Rice, Stix & Co. recovered a judgment in the cir-

cuit court of Crockett county, against W. B. & H. H. Richardson, from which they have appealed to this court. The suit originated before a justice of the peace upon a note, (executed by plaintiffs in error to defendants in error), and was payable at the office of Dickinson, Williams & Co., and seems to have been endorsed by Rice, Stix & Co., and delivered to Dickinson, Williams & Co., and by them transferred by delivery to the Merchants National Bank at Memphis, as collateral security for subsisting indebtedness of, and future advances to be made to Dickinson, Williams & Co., and was finally transferred to the Metropolitan National Bank, New York, for whose use this suit is now prosecuted.

The defense is, that the note was paid while held by Dickinson, Williams & Co., to them, and before its maturity. Upon the trial the defendants, amongst other things, requested the court to charge the jury, that if the defendants paid the note to Dickinson, Williams & Co. before it fell due, and while they were the holders of it, and before its transfer to the Merchants National Bank as collateral security, they should find for the defendants. This, as well as all the other requests to charge several other propositions submitted by defendants, the court refused, saying to the jury that he charged the reverse of said several propositions. After the jury had retired, they returned into court and asked, "If the note was paid by the defendants before due, to Dickinson, Williams & Co. while they were the holders of it, how should they find?" The court instructed them that such a pay-

ment would not exonerate defendants; that unless they made the payment *after the note fell due*, and before it was transferred by Dickinson, Williams & Co. to the Merchants National Bank, the payment would be no protection to them. In the case of *Gosling* v. *Griffin*, decided at this place November, 1875, Jackson, Special Judge, delivering the opinion of the court, it was held that the maker of negotiable paper is not discharged, if before its maturity, *and after its transfer, even as collateral security*, he make payment to any other than the real holder. The case of *Vatterlien* v. *Howell et al.*, 5 Sneed, 441, in which it was held that in such case, unless the holder gave notice to the maker, of the transfer, such payment would be valid, was reviewed and overruled; and it was held "that negotiable paper, taken as *collateral security*, for pre-existing indebtedness, before maturity, *and before any equities exist against it*, must stand upon the same footing as the transfer of over-due paper. The holder in neither case is considered a holder for value in due course of trade, under the law merchant. Both are subject to *all equities existing at the time of the transfer, but neither is subject to defenses arising after such transfer.*"

Following the authority of the case cited, we hold that it was error to refuse to charge the law as requested, as herein before stated, and to charge the jury as was done by the court, in answer to the question submitted to the court by the jury. The judgment will be reversed and the cause remanded for a new trial under proper instructions to the jury.

A motion was made in the circuit court and renewed here, to dismiss the appeal upon the ground that the bond for appeal was not executed within the time allowed by law. The failure to give the bond within the prescribed time for the appeal from the justice's judgment to the circuit court, was in consequence of the agreement of the adverse party to allow further time, and they thereby waived any right to take exceptions on account of such failure, and the motion to dismiss was properly overruled by the circuit court.

H. T. Ellett v. Richardson & Co.

Married Women. *Deeds. Privy examination.* A certificate by a commissioner appointed under section 2077 of the Code, for the privy examination of a married woman as to her deed, which omits the words "and having been examined," is fatally defective, and the deed is void.

Cases cited: 1 Col., 225-31; 1 Hum., 140; 7 Hum., 85; Mount v. Kesterson, 6 Col., 457.

Code cited: Sections 2076-7, 2080.

FROM CROCKETT.

Appeal from the Circuit Court. G. B. Black, Judge.

No counsel marked.

FREEMAN, J., delivered the opinion of the court.

The only question in this case is, whether the privy examination of the wife is sufficient to convey the homestead right, by virtue of the deed of trust sought to be enforced in this proceeding. The acknowledgment of the deed was taken before S. S. Watkins, by virtue of a commission issued to him from the county court of Crockett county. The certificate of the justice is as follows:

State of Tennessee, } Personally appeared before me,
Crockett County. } S. S. Watkins, an acting justice of the peace in and for said county, Mrs. Martha J. Richardson, the *feme covert* to the foregoing mortgage, and privately and apart from her husband, and acknowledged the execution of the same to have been done by her freely, voluntarily and understandingly, without compulsion, restraint, threat or bribe, or intimidation from her husband, and for the purposes therein expressed."

This certificate leaves out the words "and having been examined," and the question is, whether this is a substantial compliance with the requirement of the law, or merely a verbal departure from the language, such as provided, section 2080, shall not vitiate the acknowledgment. It is settled by our decisions, and seems to be the principle on which most of them rest, that a "set form being prescribed, all implication as to every material fact made necessary by law is entirely excluded." 1 Col., 225; *Id.*, 31; 1 Hum., 140;

7 Hum., 85. The Legislature having required that the certificate shall show the commissioner had examined the wife, privately and apart from her husband, we are not at liberty to say, that a certificate that fails to show this was done, is a compliance with the law. This is not a mere verbal omission, which can be overlooked, because it requires the act to be performed by the officer, that is not included in the fact of a mere acknowledgment of the execution of the instrument. Taken in connection with the requirement of sec. 2076 of the Code, that the officer before whom the acknowledgment is made, "shall examine the wife privately and apart from her husband, touching her voluntary execution of the same, and her knowledge of its contents and effects," and we can see a good reason why this requirement should be held to be a matter of substance. Something more is here evidently required, besides the mere acknowledgment, that she had executed the paper. It is true the form prescribed when the acknowledgment is made before the clerk, does not contain these words, yet the Legislature having prescribed them when it is done before a commissioner, they must be held substantial—and without them the acknowledgment void. We need not attempt to find a reason for this difference in the forms prescribed. It is sufficient that it is so enacted.

The case of *Mount* v. *Kesterson*, 6 Col., 457, only decided that it was not necessary the husband should also acknowledge the deed, but that it took effect so

far as he was concerned, by execution and delivery, except as to creditors and *bona fide* purchasers.

For these reasons, we affirm the decree of the chancellor with costs.

W. K. Dial, in error, v. E. G. Wood.

1. Persons under disability. *Infant. Torts. Liability.* An infant is liable for his torts, and his property may be taken in execution to satisfy a fine and costs in a criminal prosecution.

2. Same. *Liability to surety for fine and cost.* Where in such case the infant gives security for the fine and costs to prevent being held in custody, and his surety pays the same, and on motion takes judgment over against the minor, this judgment though arising out of a civil contract, is valid and binding upon the infant.

3. Same. *Execution. Guardian. Garnishment.* Such judgment may be enforced in favor of the surety against the property of the infant by garnishment served upon the guardian.

Cases cited: Beasley v. State, 2 Yer., 491; Jones v. Ward, 10 Yer., 160.

FROM GIBSON.

Appeal from the Circuit Court. G. B. Black, Judge.

Spl. Hill for plaintiff.

Jones & Elder for defendant.

McFarland, J., delivered the opinion of the court.

Henry Mobley was adjudged to pay a fine and costs upon a conviction for a misdemeanor. Wood became Mobley's surety and satisfied the judgment; and thereupon, in the same court, upon motion, took judgment over against Mobley for the amount so paid. Upon this judgment execution issued, and Dial was summoned to answer as garnishee. He appeared and answered, and upon his answer there was judgment against him in favor of Wood. Dial has appealed. His answer states that Mobley was a minor, and that he, Dial, was his guardian, and had in his hands funds sufficient to pay the judgment. Upon this, two questions are presented: 1st, Whether the judgment in favor of Wood against Mobley is valid; and 2d, If so, can the funds in the hands of Dial, the guardian, be reached by garnishment for its satisfaction?

An infant is liable for its torts, and his property may be taken in execution to satisfy a fine and costs in a criminal prosecution. *Beasly* v. *The State*, 2 Yer., 491. The infant's property in this instance was liable to execution for the satisfaction of the fine and costs against him. The judgment in favor of Woods was, however, a civil proceeding and founded upon the contract of Mobley by which Wood became his surety, and, in general, an infant is not bound by his contracts. This, however, we think is an exception. The rule is, that if an infant does what by law he is bound to do, the act is binding; as, where an infant being the father of a bastard child is required to give surety,

his infancy is no defense to either him or his sureties on the bond. Tyler on In., 7, and Cir., p. 139, and authority cited. So he is liable to an action or his recognizance to appear and answer a criminal case. Same authority, p. 175. So, in this case he was adjudged to pay a fine and costs and ordered to give sureties for the same or be held in custody. We think the contract of suretyship was binding upon him, not only in favor of the State, but also in favor of the surety.

The case of *Jones* v. *Ward*, 10 Yer., 160, is not in point. That case only holds that an executor or guardian is not authorized to pay the improvident contracts of a minor in order to save his reputation. We hold the judgment in favor of Wood, which as we have seen might have been satisfied out of the infant's property, valid, and that he may have satisfaction out of the infant's property, as he has the judgment in favor of the State. We do not see any good reason why the remedy by garnishment against the guardian should not be allowed. It has been allowed against executors. It is simple and less expensive than a resort to a chancery court, which would involve an expense equal to the amount involved, if, indeed, a chancery court would take jurisdiction, the amount involved being less than fifty dollars.

The judgment will be affirmed with costs.

Elizabeth Atwater v. W. E. Butler, Sr., *et al.*, and Annie McKinlay v. Christian Kuntz.

1. Dower. *Homestead. Deed of trust. Mortgage. Power of married woman to alienate.* In construing a deed of trust by a husband and wife, containing the following clause: "We hereby release and relinquish all right, claim, and interest whatever, in and to said lot of ground, which is given by or results from all laws of this State, pertaining to the exemption of homestead or dower," the court say: "Although we have no special statutes authorizing a *feme covert* to release her inchoate right of dower, yet we think she may convey or release this right under the same principle that our laws allow her to convey any other interest she may have in lands." The above language we hold to be sufficient.

Cases cited: Combs v. Young, 4 Yer., 218; Rutherford v. Read, 6 Hum., 423; Tarpley v. Gannaway, 2 Col., 246; Boyce v. Boyce & Bradley, 1 Col., 12.

Code cited: Sec. 2399.

2. Same. *Same.* The court hold the following clause in a similar deed to merely convey the homestead interest, leaving the dower right unaffected: "And in the event of sale we waive all equity of redemption and re-purchase and homestead in said property."

FROM MADISON.

Appeal from the Chancery Court. H. W. McCorry, Chancellor.

R. W. Haynes for complainant.

C. G. Bond for defendant.

Atwater v. Butler.

McFarland, J., delivered the opinion of the court.

Complainant charges that her husband, Griffin Atwater, was in his lifetime the owner of a certain house and lot which constituted their homestead; that they executed a deed of trust conveying the property to a trustee to secure a debt owing by the husband to the defendant, Butler; that she joined in the deed, which contains this clause, to-wit: "We hereby release and relinquish all right, claim and interest whatever, in and to said lot of ground which is given by or results from all laws of this State pertaining to the exemption of homestead or dower." Griffin Atwater died before this deed of trust was foreclosed. The bill prays to have the trustee enjoined from selling so as to affect complainant's right of dower, with a prayer to have dower assigned. It is argued with much ingenuity that a married woman cannot release or convey her right to dower under our law. The argument is, that under our statutes the right to dower does not accrue until the death of the husband; that before the death of the husband, the wife has no right or interest in the land, and that a married woman cannot bar or estop herself by her deed as to future rights, but can only convey in the mode prescribed by the statute, such present right or interest in the land as she may own. It cannot be seriously denied, that where the right of dower exists as at common law, the wife may release her right by joining in the conveyance of the husband for that purpose. By the

common law the wife was entitled to dower in a third of all the land of which the husband was seized at any time during the coverture. Her right related to the marriage which was a valuable consideration, and her claim was, therefore, superior to the purchaser from the husband after the marriage, and also superior to the claims of creditors. By our act of 1784, this common law right of the wife was changed; her right to dower was restricted to lands of which the husband died seized. The question then arose, whether the widow's right to dower after this statute, was or was not superior to the claims of creditors. If her right only accrued upon the death of the husband and she took her interest from him as the heir took his title, it was argued that she must take subject to the claims of creditors, precisely as the heir takes. It was held, however, in *Combs* v. *Young*, 4 Yer., 218, that the widow's claim was still superior to the claims of creditors, notwithstanding the act of 1784. This decision was placed upon the ground that the widow's right in reference to lands of which the husband dies seized, stands upon the same footing it did previous to the act of 1784; that is, her right related to the marriage, and she is a purchaser for a valuable consideration. The change effected by the act of 1784 was, that the right of dower is defeated either by the absolute conveyance of the husband, or by any means which divests the husband's title absolutely. The purchaser from the husband has a superior right to the widow; but if the husband die seized of the land, the widow's right is not regarded as accruing at that time, but

relates to the marriage. The case of *Combs* v. *Young*, was recognized and approved in *Rutherford* v. *Read*, 6 Hum., 423, where it was held the claim of dower was superior to the claim of a creditor who had secured a specific lien by levy of an execution in the lifetime of the debtor. It was held that this was not changed by the act of 1856, Code, sec. 2399. See *Tarpley* v. *Gannaway*, 2 Col., 246.

This act of 1856, which gives dower in lands mortgaged, where the mortgager dies before foreclosure, is simply a partial return to the common law; that is to say, previous to this act, the right of dower might be defeated by the deed of the husband, but after this latter act was passed, the right would not be defeated by the deed of the husband conveying the land to secure debts, unless the deed was foreclosed and the land sold before the husband's death. Dower might still be defeated, however, by the absolute conveyance of the husband. That the dower right still rests upon the common law principle, with the modification we have stated, is fully recognized in *Boyce* v. *Boyce & Bradley*, 1 Col., 12, where it was held that a widow was not entitled, under the act of 1856, to dower in lands mortgaged by the husband before the marriage, although he died before foreclosure, upon the ground that the wife's inchoate right attaches upon the marriage, and as the land had been conveyed before the marriage her right did not attach, although her claim was directly within the letter of the statute. Although the act of 1856, above referred to, gave dower to the widow, where the lands were mortgaged

to secure debts and the debtor died before foreclosure, still this right would be defeated by the subsequent absolute alienation by the husband, as we have held. These authorities fully establish that, that during the coverture the wife has the inchoate right of dower as at common law; and as it cannot be seriously denied that she could convey or release her right of dower, when that right exists as at common law, we think it equally clear that she may release or convey the right, notwithstanding the changes of the common law made by our statutes. Although we have no special statutes authorizing a *feme covert* to release her inchoate right of dower, yet we think she may convey or release this right under the same principle that our laws allow her to convey any other interest she may own in lands. It is true that her conveyance or release can only be important in cases of mortgages or deeds of trust; as in cases of absolute conveyances her assent or joining in the deed is not necessary. We have examined the authorities referred to, but we think the conclusion we have arrived at is correct. The decree of the chancellor will be affirmed.

The case of *Annie McKinlay* v. *Christian Kuntz*, trustee, is in all respects similar, except that the deed contains no express release of dower. It is a conveyance to secure debts; it purports to be the deed of the husband and wife, and uses the usual words of a conveyance by both, with covenants of warranty. After giving to the trustee the power of sale, the deed adds: "And in the event of sale we waive all

equity of redemption and repurchase and homestead in said property;" but the deed contains no express release of dower. It is made absolutely essential under our constitution and statutes, that the wife shall join in the deed to bar her right of homestead; and where she joins for that purpose only, we do not think her rights of dower will be lost, as in cases of mortgages and deeds of trust where the husband dies before foreclosure and sale. In the present case, it is true words are used which seem sufficient to convey any interest the wife might have had in the land, still we think the purpose only was to release the right of homestead, as this is expressly specified. Mr. Bishop says it is commonly held that the deed must contain apt words signifying a release of dower; that, for instance, it is not sufficient for the wife to join the husband in the general covenants of the deed. See Bishop on the Rights of Married Women, sec. 449.

We hold that the complainant in this case did not release her right of dower by her deed, and the decree of the chancellor will be reversed, etc.

M. T. Cox *et al.* v. R. W. Scott *et al.*

1. Married Woman. *Separate property. Insurance collected and reinvested. Husband's consent. Reduction into possession.* A married woman collected the insurance on a house which she had owned, and invested it again in real estate, her husband assenting to her control and disposition of the fund: *Held*, that the money so collected was not so reduced into the possession of the husband that the equity of the wife was defeated.

2. Same. *Chose in action. Reduction into possession.* A chose in action of a married woman, though it accrues during coverture, does not become the property of the husband unless reduced into his possession.

3. Same. *Wife's earnings. Reduction into possession.* Personal property, though purchased with the earnings of a married woman, is subject to the husband's debts, though he did not reduce the money to possession, where there is no separate estate.

Cases cited: Wade v. Cantrell, 1 Head, 346; Hollingsworth v. Miller, 5 Sneed, 472.

4. Semble, that a wife is a competent witness in her own behalf, though her husband be a necessary party to the same case with her.

FROM GIBSON.

Appeal from the Humboldt Chancery Court. John Somers, Chancellor.

McFarland & Bobbit and Spl. Hill for plaintiffs.

H. T. Johnson for defendants.

McFarland, J., delivered the opinion of the court.

The complainants are the creditors of R. W. Scott, and under this bill have attached a house and lot in the town of Milan, claimed by Mrs. S. E. Scott, wife of said R. W. Scott, and certain furniture therein, for the satisfaction of their debts. The bill charges that the house and lot was sold at a chancery sale and bid off in the name of Mrs. Scott, at the price of $2,700—$540 of which was paid in cash, and a note given for the balance by Calvin H. Ferrell. That the $540 paid was the money of R. W. Scott, and that Scott paid into the hands of Ferrell $2,160, with the agreement that Ferrell was to give his note to the clerk and master for the amount, being the balance of the bill over the cash payment; so that the entire purchase price of the property was paid as the money of R. W. Scott, and that this was a fraudulent device to vest the title of the property in the wife to hinder and delay creditors—the husband being at the time indebted largely, and insolvent. The answers admit the purchase of the property and the vesting the title in Mrs. Scott, but deny that any part of the money paid belonged to R. W. Scott. They say that Mrs. Scott paid $540 in hand, and gave her note, with C. H. Ferrell and her husband as sureties for the balance of $2,160. This note was afterwards taken up and the note of Ferrell, with R. W. & Mrs. Scott as sureties, substituted. That Mrs. Scott had previously loaned to Ferrell $2,173.25, and that after she purchased the lot, Ferrell, at her request

substituted his note to the master for her's for $2,160, in satisfaction to that extent of the money he owed Mrs. Scott. The answers deny that any part of the $540 paid in hand, or of the money loaned Ferrell, belonged to R. W. Scott; that no part of it was ever in his possession, except under the directions of Mrs. Scott, and then only for the purpose of paying it out. Mrs. Scott gives in her answer the following account of the sources from whence she derived the sums of money above referred to: Several years previous, her father-in-law, W. D. Scott, made her a deed to a house and lot in Humboldt; that she had the house insured, and it having been destroyed by fire, the insurance company paid her $1,250; that after the house was burned she sold the lot for $800, and of her own earnings she had saved $240. She had used some little of the money after the financial reverses of her husband, and loaned the remainder, $2,173.75, to C. H. Ferrell, and when she made the purchase of the house and lot in controversy, she borrowed of her father-in-law, W. D. Scott, $1,200 to assist her in paying for the property and purchasing such furniture for the house as was necessary.

One of the questions argued before us is, "as to the competency of R. W. & Mrs. Scott as witnesses." Under our decisions, it is clear the husband is not a competent witness for the wife. It seems to us to be a hard rule, to hold that the wife cannot be a witness for herself, because the husband must necessarily be a party to the cause, and has a legal interest in the result, while under our statutes the other parties may

be witnesses. Whether there should be a modification of the holdings of this court upon the question, we for the present pass over, as in our view the result would be the same in either event.

It is argued upon behalf of the complainants, that excluding the testimony of Mrs. Scott and her husband there is no evidence to sustain the statements of the answer in regard to the money used in paying for the property; but in our view the *onus* is upon the complainants to overthrow the title of Mrs. Scott and show affirmatively that the property was paid for with the money of the husband; and although the testimony of Shane and Harris raises a strong suspicion that other money of the husband might have been used, yet it is not sufficient to establish the fact. So that if the testimony of both Scott and wife is excluded, there is not sufficient testimony to overthrow the statements of the answer. We merely add, that the discrepancies between the depositions of Scott and wife, and between these depositions and their answer, tend rather to weaken than to strengthen the cause of the defendant. We will take it, then, that the statements of the answer as to the manner in which the property was paid for, and the sources from which the money was derived, are true—except that it is perhaps shown that she did not receive the use, or all of the money for which she sold her joint lot in paying for the property in question, one of the notes being otherwise used. We will assume that Mrs. Scott had in her possession $540, and that she sent this by her husband to make the cash payment; that she also had in her

possession $2,160, or more, which she had previously loaned to Ferrell, and in settlement of this Ferrell gave his note to the clerk and master for the deferred payment; that $1,250 of the money was the insurance money on Mrs. Scott's house in Humboldt, $240 her own earnings, and the balance was borrowed from her father-in-law to finish paying for the property and to purchase furniture, and that R. W. Scott never had any of the money in his possession except under the directions of Mrs. Scott. The question upon these facts is, whether any part of this money was in law the money of R. W. Scott. There certainly can be no reasonable doubt that the furniture attached was in law the property of the husband, although paid for with the money above referred to. Personal property in possession—and the possession *of* the wife in such cases is the possession of the husband—is in law the property of the husband, nothing else appearing to show a separate property of the wife. *Wade* v. *Cantrell*, 1 Head, 346; *Hollingsworth* v. *Miller*, 5 Sneed, 472. No objection was made as to the manner of reaching this property, and we think the creditors are entitled to appropriate the same, and may have a decree upon the replevin or delivery bond executed in this case.

But the question is, as to the real estate. The burning of Mrs. Scott's house in Humboldt converted to that extent her real into personal estate, in the form of a chose in action due her from the insurance company. There are authorities to the effect that a chose in action accruing to the wife *during* coverture,

becomes the absolute property of the husband without a reduction to possession; but according to the English cases, which seems to us to be the more reasonable, there is in this respect no distinction between a chose in action accruing to the wife during coverture, and choses due her before marriage; in either case, the right of the husband depends upon a reduction to possession. The marital right of the husband then attached to this chose in action, and it would become his upon a reduction to possession; but before a reduction to possession the equity of the wife therein to a reasonable possession would be superior to the rights of creditors. The question then is, what is such a reduction to possession by the husband? Upon this question the authorities are not to be reconciled. We have in this case a payment of the money due on the chose of the wife to *the wife herself*, without more, and that money retained in her possession until it is loaned out by her, and used in paying for the property purchased, without any affirmative action by the husband, except that he aids and assists the wife in paying out the money in the purchase of the property in her name, and in this way clearly assenting to her use of the money. The general principle of the common law is, that marriage amounts to an absolute gift to the husband of all personal goods of which the wife is actually or beneficially possessed at the time, *or which comes to her during the coverture.* Story E. J., sec. 1402; *Wade* v. *Cantrell*, 1 Head, 346. So that, if she have money in her pocket, or personal property in the hands of a third party, the title vests

at once in the husband without more, and it is not necessary that he take actual possession to complete his title. Bishop on the law of Married Women, sec. 66, *et seq.* If it be a chose in action of the wife requiring an action at law, he must reduce it to possession; but the possession of the wife is for some purposes at least, the possession of the husband, and a payment to the wife will, in general, where nothing else appears, be a payment to the husband and a reduction to possession. Bishop M. W., sec. 115. In fact it is in general held that the wife cannot receive payment except as the agent of the husband. That a payment to the wife, where nothing else appears, vests the money in the husband, results from the general principle above stated, that marriage amounts to an absolute gift to the husband of all the personal goods of the wife capable of actual possession, which she has at the time *or which comes to her during the coverture,* without any actual or manual possession by the husband. For money paid to the wife during coverture upon a chose of hers, would stand like money in her hands at the time of the marriage, and if the title of the husband vests in the one case without actual possession by him, so it must in general in the other. But this rule, according to many authorities, is subject to this qualification: that is, that a reduction to possession by the husband himself, will not in all cases vest the money in him, to the exclusion of the wife's equity, for he may receive it as her trustee, upon a provision to invest or hold it for her. In such case, the wife's equity is not lost, and if such a payment

to the husband will not extinguish the wife's equity, a like payment to the wife herself ought not to do so. Bishop M. W., sec. 116; sec. 119, *et seq.* The cases are conflicting—some holding that a mere receiving by the husband of the wife's property will not be such a reduction to possession as will affect the wife's equity, unless he receives it solely in the exercise of his marital right and for the purpose of its appropriation to his own use. Such, Mr. Bishop says, was the doctrine of a Vermont case, and such he thinks is the better view, although the decisions of the several States are conflicting.

We have in this State a large number of cases, where the funds of a married woman are received by the husband under a contract or promise upon his part to invest for the wife, and in such cases the wife's equity to follow the fund has always been recognized. These are cases of resulting trusts, but it is the settled doctrine in these cases that if the funds are received by the husband without any such promise or agreement at the time, the fund is absolutely vested in the husband and the wife's equity is gone. In the present case there is no express promise proved upon the part of the husband that the fund should be held for the benefit of the wife; but we have the fact that the money was paid to the wife, kept in her possession separate from any funds of the husband, loaned out again in the name of the wife, upon a note to her, and then her debtor assumes in discharge of his debt to her, to pay the balance of the purchase price

of the property in question, and to all this the husband not only assents, but actually assists in consummating. We think this shows that the husband assented all the time that the money should be thus used by the wife, and excludes the idea of any assertion of right or ownership upon his part, or any intention to convert the money to his own use, and we think it is in effect equivalent to a promise upon the part of the husband at the time the money was paid to the wife, that it should be held and invested for her use. If the husband receive the money under a promise to invest for the wife, equity will uphold the right of the wife. We do not see that the wife's equity should be any less when she has herself received the money and reimbursed it for herself, under circumstances which show clearly that the husband was all the time assenting that this should be done, and which clearly excludes the idea of any assertion of any right upon the part of the husband.

We admit that in general the possession of the wife is the possession of the husband; that the law does not enquire into or distinguish between the possession of the wife and the possession of the husband, but upon the peculiar facts of this case we think the wife's equities in this fund was not lost. The case of *Wade* v. *Cantrell*, 1 Head, was a contest over the title to a slave, and the court held the title in the husband, notwithstanding he had disclaimed any title in himself. In that character of case the wife could have no equity separate from the legal title. We

conclude that the wife's equity in this fund was not lost, and its investment in purchase of other property for her was no fraud upon the husband's creditors.

As to the $1,200 borrowed of W. D. Scott, it appears he held an unsatisfied mortgage on the property for the repayment of this sum, and he is not a party to this suit. We do not see that the creditors can predicate any claim upon this ground—certainly none superior to the claim of W. D. Scott. The $240, earnings of the wife, was in law the money of the husband, but it is not clear that any of this went into the land, part of the money was otherwise expended and some expended for the furniture.

The decree on the house and lot will be reversed, but as to the personal property, a decree may be had for the complainants on the replevin bond. The costs of this court will be adjudged against W. D. Scott.

JNO. C. M. GARLAND *et als.* v. ALLEN WEST & CO.

1. BILLS AND NOTES. *Principal and surety. Demand and protest. Days of grace.* Where a statute does not allow grace upon a note, a protest upon the last day the note has to run is good, and will bind the endorsers. Though the maker has all of this day in which to pay the note, yet it is the day of the note's maturity, and demand may be made before the close of the day.

Case cited: Coleman v. Ewing, 4 Hum., 241.

2. SAME. *Same. Pleading and practice. Evidence.* Where the declaration avers, in general terms, that the note was presented "at maturity" and payment demanded, etc., and upon this there is plea denying the demand, etc. *Held*, that under sec. 2939 of our Code, evidence may be introduced to prove the statute of another State, where the note fell due, as to the days of grace, demand and protest, etc., allowed in such State.

Code cited: Section 2939.

FROM MADISON.

Appeal from the Law Court. R. W. HAYNES, Special Judge.

CAMPBELL & MCCORRY and J. L. BROWN for plaintiffs.

MUSE & BUFORD for defendants.

MCFARLAND, J., delivered the opinion of the court

Jno. L. Lancaster & Son made their note at Jackson, Tennessee, 28th August, 1872, papable ninety days after date, to John C. M. Garland or order, at the

office of Allen West & Co., Mobile, Alabama, for $5,641.01, with ten per cent. after maturity. This note was endorsed by Garland and Alex. Futrell, and was discounted by Allen West & Co. for Lancaster & Son., Garland and Futrell being accommodation endorsers. This action is by Allen West & Co. upon the above note, and the question is as to the liability of the endorsers. Payment was demanded and the note protested on the 26th day of November, 1872, which was ninety days from date, excluding the day of the execution, so that the demand was made without allowing the three days of grace. The plaintiffs, in order to show that the note was not entitled to "grace," introduced in evidence certain sections from the Code of Alabama, to-wit: Sec. 1525, "Bills of exchange and promissory notes, payable in money, at a bank or private banking house, are governed by the commercial law, except so far as the same may be changed by this Code." Sec. 1526, "All other instruments payable in money at a bank or private banking house, are governed by the commercial law as to days of grace, protest and notice." Sec. 1527, "No days of grace are allowed on any contracts, except those enumerated in the two preceding sections." And the plaintiffs also proved that the office of Allen West & Co. was not a bank or private banking house. The defendants objected to this testimony, upon the ground that the plaintiffs' pleading did not allege that three days of grace were not allowed by the laws of Alabama, and did not contain such averments as authorized them to prove a foreign law, and the objec-

tion was overruled. The declaration avers in general terms that the note was presented "at maturity" and payment demanded, etc. There is no averment as to the day of the demand, or whether the days of grace were or were not allowed. One plea denies the demand at the maturity of the note, and upon this there was issue. We hold that there was no error in the action of the court in admitting the evidence, especially under the section of pleading adopted by our Code, a form substantially like the present declaration is prescribed. See sec. 2939. Had the declaration averred demand on a particular day, and it had appeared on the face of the declaration, that according to the common law, this was not the right day, then it would have been proper in order to avoid a demurrer to have averred the laws of Alabama, and the facts which rendered the note payable on the day of the demand. The averment here, however, is simply a demand "*at maturity.*" The day of maturity was a mixed question of law and fact, and the issue was properly made, at least under our Code. 2. It is next insisted that conceding that the note was not entitled to grace, that it was not subject to protest on the 26th of November. It is not denied that the 26th of November was the ninetieth day, excluding the day of the execution, and it is not denied that this was the day the note was payable, if not entitled to grace. It is argued, however, that by the contract the maker was entitled to the whole of that day in which to make payment, and was not liable to be sued until the next day. It is conceded that where the

three days of grace are allowed, the demand and protest may be made on the third day; but it is argued that it does not follow from this, that where grace is not allowed, the demand and protest may be made on the day the note is payable by the contract. The difference being, that the same custom which allows the days of grace, allows also the demand to be made on the third day. It is said this is an open question. We have found no statements in the rule in such cases. In *Coleman* v. *Ewing*, 4 Hum., 241, it was held that demand might be made and suit brought on the last day of grace, because such was the custom, and the custom made the law. It is said that in contracts not negotiable the payer has the last moment of the last day on which the contract fell due to discharge the same, and that he cannot be sued until after that time. But the *demand* must be made at maturity, not afterwards, according to commercial usage, and upon this the liability of the endorser depends. The maturity is either the day the note falls due by the contract, or on the third day of grace; a demand made the day after maturity, would be too late. It is settled that a demand made during the business hours of the day of maturity is sufficient. It is not necessary to wait until the last moment of the day. Although by the contract the maker has the whole of that day in which to pay, yet by the law merchant, or the custom which constitutes the law in this regard, it is a part of the implied contract of the endorser, that his liability shall be fixed by a demand made on the day of maturity

and notice of non-payment. We hold that the demand was properly made on the 26th November.

It is again argued that as this note was endorsed for accommodation of the maker, to be discounted in Alabama, that the liability of the endorser must be determined by the laws of that State. Section 1543. The liability of the endorser in such case must be fixed by a suit brought against the maker in the county of his residence, to the first court to which suit can properly be brought; to be followed after judgment by execution. We have not access to the reports of Alabama, to see what construction has been put upon this section, but we find in a subsequent section, among other exceptions, that the holder of such endorsed paper is excused from bringing suit, etc., when the maker has no known place of residence in the State. This exception, we take it, applies to the present case, and is a complete answer to the position assumed.

Other objections have been urged, but we think they are not tenable. The liability of the endorsers was fixed by demand, protest and notice, and the judgment must be affirmed.

M. M. Bledsoe *et als.* *v.* H. W. McCorry.

Redemption. *Judgments and decrees. Revivor. Administrator.* Where a debtor, whose land has been sold to satisfy one judgment, and bought by the creditor, and dies, after a second judgment is obtained, but before the redemption of the land, it is not necessary for the second judgment creditor to revive his judgment against the heirs, in order to redeem.

Case cited: Elliott *v.* Patton, 4 Yer., 10, holding a different doctrine as to revivor of the judgment, overruled.

Code cited: Secs. 2130.

FROM MADISON.

Appeal from the Law Court. H. E. Jackson, Special Judge.

Haynes & Bond for plaintiffs.

A. W. Campbell and E. L. Bullock for defendant.

Turney, J., delivered the opinion of the court.

An action of ejectment was commenced by McCorry against plaintiffs in error for a lot of nineteen acres of land in Madison county. The material facts are: On the 28th of April, 1866, Wm. O. Hutchinson, administrator of Joseph Fogg, deceased, obtained before a justice of the peace, judgment against C. T. Knight *et als.*, for three hundred and seventy-three dollars and

thirty-two cents. Execution was issued and levied upon the land in suit as the property of Knight. Judgment of condemnation having passed, the land was sold on the 21st of March, 1868, and purchased by Hutchinson at the sum of his judgment. On the 11th of August, 1866, W. S. Calloway obtained judgment against Knight for $14.70, and on the 21st of March, 1870, Calloway transferred his judgment to H. W. McCorry. On that, McCorry paid to Hutchinson the amount of his bid, etc., credited his judgment in full, and paid the balance of the ten per cent. required by statute to the clerk of the circuit court, taking his receipt as well as the receipt of Hutchinson, which latter receipt recites all the facts ordinarily necessary in case of redemption. Upon the production of this paper, sheriff Perkins executed a deed to McCorry, reciting all necessary facts. The levy and sale were made by L. Newton, deputy sheriff, appointed by Perkins. Shortly after the sale and before the redemption by McCorry, Knight died; an administrator upon his estate was appointed; there was no revivor of the Calloway judgment assigned to McCorry; the written notice of sale, if any, served upon Knight is lost. It is insisted by plaintiffs in error, that the recitals in the deed of the sheriff to McCorry of the service of notice, are not sufficient evidence, nor in fact *prima facie* evidence of the service of notice on Knight the owner, who was in the possession of the land. We are relieved of a consideration of this question by the proof. The deposition of the deputy sheriff shows

him to have no, or very little, recollection of the circumstances of the sale, his memory had been destroyed by paralysis. Gen. A. W. Campbell proves that he was attorney for Hutchinson and prepared the notice of sale in strict accordance with the statute, gave it to the deputy sheriff, with minute instructions as to its service; that the deputy sheriff left his office and in an hour thereafter or less, Knight came in very much exited and said to him, "I suppose you are going to sell me out." This was the first time Campbell and Knight had ever spoken together upon the subject. These facts are to us conclusive proof of the service of the notice.

It is next objected, the certificate of sale was not transferred to McCorry, nor was the sheriff authorized and directed to make him a deed. This is answered by the receipt of Hutchinson reciting every fact necessary to show a complete redemption from him. Upon the production of that paper a court of chancery would have compelled the sheriff and Hutchinson to have done everything needed to perfect the title in McCorry. What the law would have compelled them to do, they might have done voluntarily. The court charged the jury, "the plaintiff was not legally entitled to redeem the land; that Hutchinson could lawfully have refused to allow the plaintiff to redeem the land, until said Calloway's judgment was regularly revived against the heirs-at-law of Knight, to whom the right of redemption descended upon the death of C. T. Knight. But Hutchinson could waive the legal objection to the plaintiff's right to redeem," etc.; "that

the legal effect and operations of Hutchinson's acceptance of his bid and interest from plaintiff, etc., was not a technical redemption, but simply an assignment by Hutchinson of his right to and interest in the land." Under this charge there was verdict and judgment for the plaintiff. While we are of opinion the merits of the case have been attained and the judgment a proper one, we think the charge erroneous. His honor, the circuit judge, followed the rule laid down by Judge Greene in *Elliott* v. *Patton*, 4 Yer., 10, viz: "When lands of the ancestor have been sold and purchased, and the equity of redemption descends to the heir, a judgment creditor of the ancestor is not entitled to redeem from the purchaser, according to the provisions of the act of 1820, until the plea of fully administered is found for the personal representative and a judgment had against the heir upon a *scire facias*." By the act of 1841–2, ch. 6, sec. 9, substantially the act of 1820, carried into the Code by section 2130, it is provided: "Real estate sold for debt and made redeemable, shall continue redeemable to the debtor and his creditors for two years after the sale, upon the terms aforesaid, no matter how often it may have been previously redeemed." There is no provision for the revivor of the judgment of the creditor in the event of the debtor's death. It is only the right of the ancestor that descends to the heir; the statute giving the right of redemption to the debtor, gives a similar right to creditors. The inducements or causes prompting the conference of these two rights are very different and distinct; the one to enable the debtor

to regain his land, the other to enable the creditor to secure his debt; to do either of which things, redemption must be from the purchaser. It is well settled in this State, that the purchaser is the legal owner of the property sold under execution, by virtue of the deed from the sheriff, subject to the equitable rights of the debtor to repurchase, upon the terms of the statute, and it is this equitable right to repurchase that descends to the heir and this alone, which in no way interferes with the statutory right of a creditor to redeem. As clearly intimated, these two rights of redemption exist independently of and in no manner affected by each other.

We are unable to see how the right of a creditor to redeem the legal title can be interfered with by the descent of the debtor's equitable right to repurchase, if the rule announced in *Elliott* v. *Patton* be adhered to. It amounts to a virtual repeal of the statute giving the right of redemption to the creditor in all cases where the debtor dies after the sale and before redemption. Under that rule, a suit to revive must be instituted against the personal representative. This necessarily consumes time. When that has been ended and the return of *nulla bona* made, then a suit against the heirs, so that by the time all these things have been done, the two years given within which to redeem, will ordinarily have expired, and with them the right of the creditor to redeem. In our opinion, the case of *Elliott* v. *Patton* was based upon a confusion of the redemption rights of creditors with that of the debtor, and a failure to recognize them to be,

as they certainly are, separate, distinct and independent rights in each to acquire the legal title of the last purchase or redeeming creditors, without in any manner obstructing the equitable rights of the other.

Affirm the judgment.

O. WOOLDRIDGE, Assignee, *v.* JESSE W. and JOHN F. PAGE, Ex'rs, *et al.*

1. STATUTE OF LIMITATIONS. *Executors and administrators. Insolvent proceedings. Chancery practice. Judgment on suit against Executor within seven years. Bill filed after seven years to subject realty.* Where suit against a personal representative is brought within the time prescribed by law for such actions, the bar of the statute is saved as to the whole assets of the estate, embracing realty, descended to the heir, which, upon exhaustion of the personalty, may be reached by bill in chancery for that purpose, filed more than seven years after death of the testator, the running of the statute being defeated by the commencement of the original suit within two and a half years from the qualification of the executor, which was diligently prosecuted to judgment.

Cases cited: Smith *v.* Hickman's Heirs, Cooke's R., 329; Pea *v.* Waggoner, 5 Haywood, 1; Johnson *v.* Dew, 5 Haywood, 224; Peck *v.* Watson's Heirs, M. & Yer., 353; Williams *v.* Conrad, 11 Hum., 412; Stone *v.* Sanders, 1 Head, 249; Earles *v.* Earles, 3 Head, 366; Wayne Davidson *v.* Evans, Adm'r, *et als.*, MS.; Venable *v.* Estill, MS.

Code cited: Sections 51, 2252, 2281, 2786.

2. SAME. *Same. Supreme Court. Scire facias.* The judgment creditor in this case sued out a *scire facias* in the supreme court, against the heirs, to show cause why the judgment should not be revived, and satisfied out of the real estate descended to them. The court say:

Wooldridge v. Page.

To a *scire facias* sued out by a judgment creditor, to subject the realty descended to the heir, the latter may make all defenses that were, could or should have been made by the personal representative in the original action, the judgment against the personal representative being only *prima facie* evidence of indebtedness against the heir. He may also make an issue with the personal representative as to the mismanagement and waste of the personalty. It is doubtful, therefore, whether the supreme court, a court of appellate jurisdiction only, has jurisdiction of such writ of *scire facias*. In this case the question need not be decided, because there was no plea of fully administered in the original action, without which there can be no further proceeding at law against the heir.

FROM SHELBY.

Appeal from the Chancery Court. R. J. MORGAN, Chancellor.

GANTT & PATTERSON and METCALF & WALKER for plaintiff.

VANCE & ANDERSON and HUMES & POSTON for defendants.

TURNEY, J., delivered the opinion of the court.

In March, 1867, W. M. Folwell died, testate, in Shelby county. Defendants qualified as executors of his will in April, 1867. P. G. Meath brought suit for a debt alleged to be due from the testator, at the September term, 1876, of this court. Judgment was recovered against the executors for $23,633, in the name of Wooldridge, assignee, etc., of Meath. On the 4th of December, 1876, Wooldridge filed a bill in the chancery court at Memphis, against the executors and devisees of Folwell, alleging the foregoing facts, and

also, that the personal assets were exhausted, and praying a sale of real estate for the satisfaction of the judgment. The bill was demurred to upon the ground that it was barred by the statute of limitations of seven years. Demurrer was sustained, and the cause appealed. At the April term, 1877, of this court, Wooldridge sued out a *scire facias* against the devisees of Folwell, to show cause why the judgment should not be revived to be satisfied out of the real estate devised to them. The causes are heard together.

We think the objections to the jurisdiction on the *scire facias* is well taken. In answer to that writ, the parties defendant may not only make all the defences that were, could, or should have been made by the executors to the original action, but may also make an issue with the executors as to their management and waste of the personalty, the judgment against the executors being only *prima facie* evidence of the indebtedness against the devisees; and while the inquiries thus involved can, perhaps, only be had in a court of original jurisdiction, yet we are saved an investigation and determination of the question by the fact that there was no plea of fully administered in the suit at law, without which no proceeding at law can now be had against the heir or devisee.

The demurrer to the bill is based upon sections 2281 and 2786 of the Code. The first is in Art. 13, entitled, "Limitations of suits against personal representatives," and in the words, "Infants, persons of unsound mind, and married women, may bring their several actions within one year after the removal of

their disabilities, notwithstanding the lapse of said periods of two and three years, so that such suit be brought within seven years after the death of the debtor, if the cause of action accrued in his lifetime, or otherwise, within seven years from the time the cause of action accrued." The other is in Art. 3, under the title, "Limitations of actions other than real," and in the words, "But all actions against the personal representative of a decedent, for a demand against such decedent, shall be brought within seven years after his death notwithstanding any disability existing, otherwise they will be forever barred." These two sections and the act of 1715, ch. 48, sec. 9, except the first clause of sec. 2281, containing a saving in favor of persons under disability and which is a proviso from the act of 1789, ch. 23, sec. 4. Many authorities are cited by solicitors for defendants—the first being the case of *Smith* v. *Hickman's heirs*, Cooke's R., 329. The facts of that case are, the ancestor of the defendants, sometime in the spring of 1789, executed an obligation to the complainant binding him to convey six hundred acres of land in a reasonable time. The ancestor died in 1791, leaving defendants his heirs-at-law. Administration of his personal estate was committed to his wife and two other persons. The obligation had not been complied with; the defendants refused to satisfy it; a large estate, real and personal, had descended to them; the bill sought a specific performance, and was filed more than seven years after the death of the ancestor, and was the first and only suit ever instituted upon the obligation to

convey. The acts of limitations of 1715 and 1789 were relied on by the defendants as a bar. In that case the only question discussed and decided, that in any way aids in the investigations now before us is, whether the statute of seven years protected the heir as well as the personal representative, the court holding that it protects the one as well as the other; that statutes of limitations are made for the peace and quiet of the people. This holding was in response to the position of complainants, that no statutes of limitations did or could apply in the particular case. It is to be observed further of that case, the time within which to sue the personal representatives had elapsed—no suit had ever been brought against them, nor could it have been maintained at the date of the filing of the bill. The case of *Lewis' Ex'r* v. *Hickman's heirs and adm'rs*, is very similar to *Smith* v. *Hickman*, and was determined upon its authority. No suit was instituted until after the lapse of seven years from the death of the ancestor and intestate. In *Pea* v. *Waggoner*, 5 Hay., 1, the bill charged that the complainant, as administrator, paid debts due from the intestate to a considerable amount more than the assets which came to his hands, and prayed to be reimbursed out of the real estate which descended to the heir. The intestate had been dead more than seven years, and no suit brought within that period after the death. The claim was held to be barred, and we think properly. By the payment of the debts, the administrator placed himself in no better condition than were the creditors to whom he paid; he was

merely substituted to their rights and restrictions, and must, as they would have been required to do, have instituted proceedings for the recovery of these debts within the time prescribed by the statute. *Johnson* v. *Due*, 5 Hay., 224, holds the words, "shall make their claim," means shall bring their suit within seven years or otherwise be barred. In *Peck* v. *Watson's heirs*, M. & Yer., 353, a judgment had been obtained against the administrator in June, 1811, and no steps taken to subject real estate descended to the heirs for more than seven years, and perhaps as much as fifteen or sixteen years elapsed after the judgment against the personal representative, before suit against the heirs. The case was determined by this court in 1828, when there was no delay or cause for delay in the disposal of causes. The debt was lost by laches, and not by any statute of limitations. *Williams* v. *Conrad*, 11 Hum., 412, holds that a person claiming a life interest in slaves agreed to be conveyed upon certain trusts by a person who afterwards dies, may be barred by failure to assert the claim against the estate within seven years after the death. In *Stone* v. *Sanders*, 1 Head, 249, administration was granted in March, 1848. No suit ever brought against the administrator. In October, 1857, nine and a half years after the appointment of the administrator, a bill is filed to subject slaves or the proceeds of the sales in the hands of heirs to the payment of debts. There was a demurrer and the bill dismissed. *Earles* v. *Earles*, 3 Head, 366, decides, "if the purchase money to acquire title to land is paid by one person, but the title made

to another, and the party in whom the legal title is vested dies, suit to establish a trust must be instituted within seven years after the death of such party, or the claim will be barred by the act of 1715." In the case of *Wayne Davidson* v. *Evans' adm'r et al.*, manuscript opinion by Deaderick, C. J., the death was in 1864—administration granted in 1865. No suit appears to have been against the administrator, and the bill to subject land was filed in 1874, ten years after the death. In *Venable* v. *Estill*, and *Loughmiller* v. *Estill & Venable*, the debtor died in 1857; the bill filed to reach the real estate in 187–, with nothing to show as against the heirs any suit or judgment against the administrator. In this last case, the writer of this opinion having been of counsel, took no part in its consideration, but was present at the consultation, and distinctly remembers the conclusion was concurred in for the reason already stated, and the further reason that assets were in the hands of the administrator. In view of these facts it was determined to be unnecessary to pass upon the question of the statute of limitations.

In all the foregoing cases it distinctly appears, either that there never had been suits instituted against the personal representative and judgment obtained, or if there had been, more than seven years had been allowed to elapse between the time of the obtention of such judgment and the institution of proceedings to reach the lands descended or devised. In none of them is the question involved in this case presented. By our statute, Code, sec. 51, the word "property"

"includes both personal and real property." By sec. 2252 of Code, "Every debtor's property, except such as may be especially exempt by law, is assets for the satisfaction of all his debts." It is well established, both by statutory enactment and judicial decision, that personal property is primarily liable for the payment of debts, and in cases of claims against the estate of dead men, the personalty in the hands of the representative must be exhausted before lands in the hands of the heir or devisee can be reached to satisfy such claims or debts; this being so, the personal representative must be first called on by suit to pay debts due from his testator or intestate. Whether he has the assets with which to pay, must be determined ordinarily by the result of the suit against him, and perhaps by the return of *nulla bona* to execution process. The heir has the right to demand that all this shall be done before he is vexed, and even then he may contest *ab initio* the claim of the creditor and the administration of the representative before his descent cast can be interrupted. In this case suit was brought in time and prosecuted to its termination with diligence without delay, upon the discovery of a want of personal assets to pay the debt. This bill is filed to reach the real estate, which is *assets for the payment of debts.* Every step has been taken without *laches* or delay on the part of complainant to secure his debt; he made his claim, and brought his suit in the time allowed. We are of opinion the statute means to bar only such claims as are not demanded by suit within the time prescribed after the death of the debtor,

whether brought against the representative or heir; that the proper institution of suit against the administrator or executor within time will save the bar of the statute as to realty as well as to personalty. There is no provision in the statute for a limitation as to the heir or devisee; it is by construction he is allowed to avail himself of this defense. The courts have construed the acts to protect the entire estate, unless suit is brought against the representative within a prescribed time. If we take from the statute book the provisions for defense, because of lapse of time, by the representative, there is no rule by which the heir may protect his estate at any length of time from the death of the ancestor. Then if the proposition, that suit must be brought against the representative within a definite period, or the right against the estate be extinguished be true, we think the converse equally true, that is, that the bringing of suit within the time prevents the bar as to the entire assets of the estate.

Reverse the decree and remand the cause for further proceedings.

Judge FREEMAN dissenting.

W. P. St. John *v.* Asa Hodges *et al.*

Foreign. *Administration. Bills and Notes. Comity of States. Domestic creditors.* The administrator in the jurisdiction where negotiable notes are *left* at the death of the decedent, has title to them, notwithstanding the debtor resides in another jurisdiction where there is an ancillary administration; and the administrator in the jurisdiction of the debtor's residence has no title or right to control them, unless they actually come to his possession.

Case *in judgment:* Arnold died in Alabama, leaving among his assets in that State certain notes on Hodges, of Arkansas. St. John became administrator of Arnold in Alabama, and turned the notes over to an attorney in Tennessee for collection. Earl became administrator of Arnold in Arkansas, and sued Hodges on the notes, and afterwards, at the instance of the attorney, but without authority from St. John, compromised with Hodges. *Held*, that St. John was not bound by the compromise, and could recover against Hodges.

Cases cited: Swancy *v.* Scott, 9 Hum., 327; Young *v.* O'Neal, 3 Sneed, 55.

FROM SHELBY.

Appeal from the Chancery Court. R. J. Morgan, Chancellor.

Humes & Poston and Metcalf & Walker for plaintiff.

Wright & Folkes, Adams & Dixon and T. M. Peters for defendants.

McFarland, J., delivered the opinion of the court.

In the year 1866, A. W. Arnold died in Alabama, having his domicil at the time in that State. W. B.

Spencer was qualified by the proper authority of Alabama, administrator with the will annexed. There came to said Spencer's hands four promissory notes of $5,000 each, payable to said Arnold, on Asa Hodges, who at the time and has since resided in the State of Arkansas. The notes were dated 31st August, 1865, and fell due severally the 1st of January, 1867, 1868, 1869 and 1870. These notes were left by the testator Arnold, as may be safely assumed, among his other assets in Alabama at his death, as they soon after came to the hands of Spencer as administrator. Spencer placed the notes in the hands of P. T. Scruggs, an attorney at law of Memphis, in this State, for collection. The notes remained in the hands of Scruggs, and in March, 1868, Spencer resigned his administration in Alabama, and the complainant, St. John, who was nominated as executor by the will, but who had renounced in the first instance, was qualified administrator *de bonis non* with the will annexed, by the probate court of Blount county, Alabama. After his appointment St. John visited Memphis on two occasions, and conferred with Scruggs in regard to said notes—Scruggs recognizing St. John as the successor of Spencer. On the last of these visits St. John was advised by Scruggs to compromise the debts. The testimony of Scruggs and St. John conflict in some respects in regard to what passed between them on this subject; they agree that Scruggs was not authorized to compromise in the name of St. John. St. John testifies that he told Scruggs that he would not compromise at any sum without express authority from

the court that appointed him in Alabama, and also from the widow and creditors; that he would return to Alabama and consult them, and in no event to compromise without hearing from him. Scruggs testifies that St. John approved the compromise, thought it best for the estate, but would not agree that it should be made in his name without express authority from the probate court of his appointment, but was willing the compromise should be made, provided it could be done in any legal mode so as to relieve him.

These witnesses also differ as to whether the proposition which was finally accepted, was ever made known to St. John. On the 5th of September, 1868, one J. F. Earl, at the instance of Scruggs, took out letters of administration from the clerk of the county court of Crittenden county, Arkansas, upon the estate of Arnold, Crittenden county being the residence of Hodges.

Earl brought an action against Hodges and filed a declaration upon the four notes in question. About the early part of January, 1869, Hodges, Scruggs and Earl met in Memphis and compromised the debts, Hodges paying $1,000, and securing two notes of $2,500 each, payable to Earl, and the four original notes were delivered up. This was without further authority from St. John. Soon after being informed of the fact, St. John returned to Memphis, took out letters of administration, as he charges in his bill, upon the estate of Arnold in Tennessee, and filed the present bill, the object of which is to set aside the compromise and recover the amount of the four ori-

ginal notes, and for this purpose to attach the money paid by Hodges, part of which was in the hands of Scruggs, and also to attach certain real estate of Hodges, which it was alleged had been fraudulently conveyed. It is charged that the compromise was without authority and was procured by fraud. It is further charged that the appointment of Earl was vacated and rendered void before the date of the compromise, by the Arkansas statutes.

Many important questions have been presented and ably argued. The facts upon which these questions arise, so far as necessary, will be more particularly noticed in connection with the several questions. 1st, It is objected, that there is no legal evidence that St. John was ever appointed and qualified as administrator of the estate of Arnold, either in Alabama or Tennessee, and that this evidence is necessary in any event *in order to show* title and right of action in the complainant, especially as the notes fell due and the cause of action accrued after the death of Arnold. The omission to file the letters was evidently an oversight; the grant of administration as charged in the bill in both States, is distinctly proven by parol testimony, without objection to the court below. If this question could be properly raised without a special plea, we hold, upon the proof, that the character in which the complainant sues is established. The parties have litigated their rights in this cause for over nine years, and they cannot now be dismissed on this ground without a hearing upon the merits. But a

more important question is, assuming St. John to be the legal representative of Arnold's estate in Alabama and Tennessee, and that Earl was the administrator in Arkansas, and that his appointment had not been rendered void at the date of the compromise, was he the legal owner of the four notes in question? Who had the title and the right of control over these notes? Upon the one hand, it is argued that the notes were *bona notabilia* in the jurisdiction in which they were left at the testator's death, that is, in Alabama, and coming to the hands of the administrator there, the title vested in him, and never having parted with this title, he may still maintain it—although to sue in Tennessee, he is compelled to administer here. On the other hand, it is argued that these notes were *bona notabilia* in the jurisdiction of the debtor's residence, and administration having been granted there, complete control was thereby obtained over the assets, and no other authority could interfere, and the settlement made by the legal representative of Arnold's estate in respect to these assets cannot be questioned by any other authority. Upon this question the authorities seem to be conflicting; we do not know that they may be reconciled. But the weight of authority and of reason seems to us to establish, that the title to these negotiable notes vested in the administrator in Alabama, where the notes were left at the testator's death; they were *bona notabilia* there; and the administrator into whose hands they came, had title to them, which was transmitted to his successor. There are many authorities holding that in such cases the

domestic administrator may assign and transfer such negotiable securities, vesting in the assignee a right to sue in his own name thereon. Among other cases, we refer to *Grace* v. *Hannah*, 6 Jones' N. C. Law, 96. In that case, Judge Ruffin said, "Bonds, it seems, are *bona notabilia* where the securities are at the death of the intestate;" and it was held that bonds left by an intestate in Georgia on a party in North Carolina, coming to the hands of the Georgia administrator, passed by his assignment, and his assignee could maintain an action in preference to an administrator appointed in North Carolina. The same was held in *Leake* v. *Gilchrist*, 2 Devereux, 73; also in *Morrill* v. *New England Ins. Co.*, 103 Mass., 248; see also, *Andrews* v. *Carr*, 26 Miss., (4 Cush.) 578; *Doolittle* v. *Lewis*, 7 J. C. R., 2 Peters, 239. This proposition may not be easily reconciled with the rule that the administator into whose hands the notes came, cannot sue in another State, unless by special legislative authority. That he may give to his assignee a right which he himself could not exercise, seems inconsistent; yet, such seems to be the law.

But it is argued, that the proposition we have announced is inconsistent with our own cases of *Swancy* v. *Scott*, 9 Hum., and *Young* v. *O'Neal*, 3 Sneed. In the first case, it apeared that a party had obtained a judgment in Kentucky and died; the debtor removing to Tennessee, administration was granted upon the estate of the plaintiff in Tennessee, and suit brought upon the judgment. It was held that the administration was proper and the action maintainable. It was said

that debts of this character were assets in the jurisdiction of the debtor's residence, and not in the jurisdiction where the payment happened to be recorded. It was said, however, that judgments did not stand upon the footing of negotiable notes. As to the latter, it was apparently conceded by Judge McKinney that they might be assigned by an administrator so as to vest an assignee into title; but he thought the administrator, by virtue of his title, could not sue in his own name in another jurisdiction, although his assignee might if no objection was made on the ground of a local administration. The case, therefore, does not decide that debts due upon negotiable notes are not assets in the jurisdiction where they are at the death of the owner.

In the case of *Young* v. *O'Neal*, 3 Sneed, it appeared that Young removed from Tennessee to Illinois and died there. He left in the hands of *an agent in this State notes* upon parties residing here. His personal representative in Illinois came to this State, and O'Neal, one of the debtors, paid him the amount of his note. Afterwards administration was granted in this State and suit brought against O'Neal upon the note. It was held that this voluntary payment to the Illinois executor was no protection. It will be observed that the notes were *not* left in *Illinois*, and never came to the hands of the executor there; on the contrary, were in Tennessee at the testator's death and came to the hands of the administrator here. So this case did not decide that the debt was assets

in this State alone from the fact that the debtor resided here.

It is true, that it was said in both these cases, and we have so held several times, that an administrator is not bound to go beyond his own jurisdiction to collect assets of the estate; his duty and authority are not extra territorial. We apprehend, however, that if the debtors in such cases should have property in the State which might be reached by process of attachment or otherwise, it would be the duty of an administrator into whose hands notes or evidences of debt should come, to proceed to their collection, and he would be liable for not doing so; and if the debtor voluntarily come within the jurisdiction, he might be sued. So that it results, that the administrator in the jurisdiction where the negotiable notes are left, has title to them, notwithstanding the debtor resides in another jurisdiction, and a voluntary payment made to the administrator in his own jurisdiction would be good, as conceded by Judge McKinney in *Young* v. *O'Neal;* and so the debtor might be sued or his property attached, if either be found in the jurisdiction where the administration was granted. But the administrator, notwithstanding he has title, is not required to go beyond his jurisdiction to collect the notes. It should be further observed, that while the residence of the debtor in this State does not necessarily draw to its jurisdiction the control of negotiable paper not actually here, yet our laws do not permit a foreign administrator, as such, to sue in our courts; and if administration here be necessary, we will make

the debts assets for the benefit of domestic creditors, and not allow them to be removed without the payment of our own creditors, if there be such.

We hold, then, that St. John had title to these notes. The question is, did he part with the title? We will concede for the argument, that Earl's appointment in Arkansas was not vacated, did this administration necessarily draw to its jurisdiction and control these debts, without actual custody and control of the notes? The Arkansas statutes allowed a foreign administrator to sue there; yet, if an administrator was appointed there and the notes came to his hand—especially if with the consent of the foreign administrator—we should be of opinion that his jurisdiction would be exclusive. See *Noonan* v. *Bradley*, 9 Wallace. But we hold that Earl would have no title or right to control these notes unless they actually came to his possession; his administration could not necessarily draw to its control negotiable notes at the time held by St. John, who had title to them with a right to collect, if he could find the debtor or his property in his jurisdiction. We do not say that St. John could have sued rightfully in Arkansas, while Earls' administration existed. And this brings us to the question of fact, whether Earl ever acquired custody or control over the notes. We are of opinion he did not; the notes were in the hands of Scruggs, as the attorney of St. John; he was not authorized, as we think from the weight of proof, to surrender them to Earl; we think he never did so; it does not appear that Earl returned any inventory

of these notes; there is nothing to show that he ever saw them, unless it was at the time of the compromise in the city of Memphis. He states that he was told that the compromise was approved by St. John. He stated at the time that he knew nothing of the merits of the compromise, but as he had become administrator at the request of Judge Scruggs, the attorney of the Alabama administrator, to assist in the prosecution of the claim, he was willing to comply with any arrangement that said administrator might make, and he accordingly signed the papers. We hold that Earl never acquired title to the notes, and for the want of it the compromise was void, and the title of the complainant, St. John, was not lost, and he is, therefore, entitled to recover upon the original notes. The answer of Asa Hodges claims a credit of over $9,700, money paid to Trezevant in discharge of a lien upon the property for which these notes were given, and which as between them Arnold was bound to remove. This payment was made before the notes in question were executed, and the presumption of law is that it was allowed in the settlement, when the last notes were given. The original indebtedness was for a much larger sum; the credit is only supported by the testimony of Asa Hodges, which is excepted to and properly rejected, as it related to a transaction with Arnold in his lifetime. The testimony of Peters is not sufficient to allow the credit, and it must be rejected.

The next question is in regard to the alleged fraudulent conveyance of the real estate attached, situ-

ated in the city of Memphis. Asa Hodges owned this property and conveyed it to John L. Malone, in exchange for lands in Arkansas. While owning the lands in Arkansas, said Asa Hodges, on the 9th of April, 1867, conveyed them to B. N. Hodges, in trust, to secure certain debts specified. Subsequently, Asa Hodges and Malone rescinded their trade, Malone again becoming owner of the Arkansas lands and Asa Hodges of the Memphis property. Malone, however, instead of re-conveying the Memphis property to Asa Hodges, conveyed it to B. M. Hodges, in trust to secure the debts mentioned in the trust deed of the 9th April, 1867, which he had held on the Arkansas land. This was said to be in pursuance of an agreement made at the time, by which the creditors agreed to release their lien on the Arkansas lands in consideration of the agreement that their mortgage was to be transferred to the Memphis property. It is this latter deed that is attacked as fraudulent. It is of date the 28th of November, 1868. The debts secured are as follows: To the Okaloua Savings Institution of Mississippi, six notes and bills as follows, to-wit: one note for $2,800, due 15th October, 1867; a bill of exchange for $2,850, due 15th November, 1867, and four notes to said bank for $5,000 each, due 1st January, 1869, 1870, 1871 and 1872, and a note to Mrs. Kate Hodges for $2,000, due the 20th November, 1868. The bill charges that no such debts were in existence; that the deed was a fraudulent device to cover up the property of Asa Hodges. Answers on oath were waived. The answer of Asa Hodges averred that

there was no fraud; that the debts were contracted and were due to the parties named. The answer of B. M. Hodges, the trustee, avers that *he accepted* the deed, for the benefit *of the creditors named*, and has reason to believe and does believe that the debts were all *bona fide* and are still so, except those since paid. The answer of the Okalona Institution avers that all the notes and bills mentioned were executed and delivered to and are still *held* by that Institution, and are *bona fide* debts, and were given for money loaned by the Institution to Asa Hodges. The answer of Mrs. Kate Hodges and her husband, Fleming Hodges, say that her note for $2,000 was a just and *bona fide* debt, but that it has since been paid, and they disclaim all further interest. It appears in proof that the note to Mrs. Kate Hodges was paid before the deed was executed, and further, that the note for $2,850 and the bill of exchange for $2,850 were all the debts held by the Savings Institution against Asa Hodges, and these had also been paid before the deed was executed; this is in fact admitted in an amended answer of Asa Hodges. The four $5,000 notes were not held by the bank, and were never claimed as debts due the institution, and the president, who is the witness who testifies, says he has no positive recollection of ever seeing the notes. He says that his information was, that such notes were executed and were intended to secure the amounts specified to Capt. Wm. Hodges and his sisters, who we understand to be the children of Fleming Hodges. Fleming Hodges testifies that these are *bona fide* debts, except that one

of the notes has been paid. He says these debts were executed in settlement of debts due *him* from Asa Hodges, or from a firm of which Asa Hodges was a member. He says no one but *himself* and his *children* have any interest in these debts. In his answer jointly with Mrs. Kate Hodges, he sets up no claim to these debts, and in fact disclaims any interest under the deed.

Upon this state of the pleadings and proof, we must hold that there are no existing debts secured by this deed of trust. The pleadings claim that these $5,000 notes are due the bank. This is clearly disproven. They cannot be allowed as debts due to Fleming Hodges under his answer and his disclaimer. They are not satisfactorily proven to be due to any one. The original indebtedness, if it existed, was in favor of Fleming Hodges. There appears an indefinite statement of the president of the bank upon information, that they were executed by the direction of Fleming Hodges and made payable to the bank, and were intended for the benefit of his children. The "children" referred to are not parties; the trustee does not claim for them, if indeed it were satisfactorily proven that they have a valid claim. All the other debts are admitted to have been paid before the deed was executed. The result is, that the property was properly attached and is subject to the complainant's demand.

The chancellor's decree will be affirmed with costs

WM. BROWN v. H. MCCLANAHAN.

BILLS AND NOTES. *Pleading and practice. Non est factum.* A note signed by making a mark may be read in evidence, unless there is a plea of *non est factum.*

Code cited: Secs. 50, 2909.

FROM MADISON.

Appeal from the Law Court. H. W. MCCORRY, Judge.

R. W. HAYNES for plaintiff.

M. M. BRIGHT for defendant.

DEADERICK, C. J., delivered the opinion of the Court.

McClanahan sued Brown upon a note signed by Brown by making his mark. No plea of *non est factum* was put in. The court allowed the note to be read to the jury, to which Brown excepted, upon the ground that the note was not so signed or subscribed, as to make him liable thereon. Judgment was rendered for plaintiff, and Brown has appealed. We are cited to section 50 of Code, which defines a number of words or terms therein used. In this section it is said "signature" or "subscription" includes a mark,

the name being written near the mark and witnessed; it means that this would constitute a "subscription," or "signature." But we do not understand the section to mean, that a party may not bind himself by a note, to which he makes his mark, or signs his initials, with the intent thereby to be bound. Defendant's name was signed, with his mark, to the note. Suit was brought upon the note, as the obligation of defendant; and even if it were a forged instrument, and purported to be signed by him, he could only contest its execution by him by plea sworn to. Code, sec. 2909. Edwards on Bills and Notes, says: "It is not necessary that a party should write his name on a note or under it to bind himself as endorser or maker; he may execute it as effectually by his initials, by figures, or a mark." Page 150. The defendant, in all such cases, has ample security against the claim, in the right, if he did not execute the note, to plead *non est factum*, and throw the burden of proof on plaintiff.

Affirm the judgment.

B. P. Boyd v. W. Mann.

Pleading and Practice. *Judgments and decrees. Actions. Justice of the peace.* An action may be maintained, in the circuit court, on a judgment had before a magistrate, under which execution has issued and levied upon land, and returned into the circuit court for condemnation.

Cases cited: Smith v. Pearce, 2 Swan, 127; Gardner v. Henry, 5 Col., 458.

FROM HAYWOOD.

Appeal from the Circuit Court. G. B. Black, Judge.

A. D. Bright for plaintiff.

J. W. E. Moore for defendant.

Deaderick, C. J., delivered the opinion of the court.

Mann recovered two judgments against Boyd and others, before a justice of the peace for Haywood county. Executions were issued, levied upon land, and returned to the circuit court for condemnation, and the land was ordered to be sold. But no sale was in fact made, nor have the judgments been otherwise paid. The return of the justice's papers into the circuit court for condemnation of the land did

not extinguish or in any manner vacate the judgments. This action was brought upon said judgments, in the circuit court, against Boyd, with counts upon judgment in the circuit court, and upon promises to pay the judgments before the justice. Upon demurrer the circuit court ruled that the action might be maintained, and upon pleas of payment, *nul tiel record* and set-off, verdict and judgment were rendered for plaintiff, and defendant appealed.

As before stated, we are of opinion that the judgments before the justice were still subsisting and operative, and that plaintiff might maintain his action upon them. Freeman on Judgments, secs. 432, 474; 2 Swan, 127; 5 Col., 458.

Some payments were credited on the judgments, and judgment was rendered for the balance remaining unpaid.

There is no error in the record, and the judgment of the circuit court will be affirmed.

MARY JOHNSON v. F. P. HALL.

1. MARRIED WOMEN. *Evidence. Contracts.* The suit being against the defendant personally, and not as the representative of her husband, plaintiff could testify as to a contract made with the deceased husband.

2. PLEADING AND PRACTICE. *Supplying lost papers. Affidavit.* The fact that a party to a suit, instead of the clerk, makes affidavit of loss of papers, is not reversible error.

FROM CROCKETT.

Appeal from the Circuit Court. G. B. BLACK, Judge.

W. F. POSTON for plaintiff.

MCFARLAND & BOBBIT for defendant.

DEADERICK, C. J., delivered the opinion of the court.

Hall, in 1870, verbally leased to Mary Johnson's husband some 16½ acres of land, the rent of which was worth about $5 per acre, for six years. Hall, about January, 1876, bought in the remainder of the lease, having then, according to their verbal contract, one year to run. Defendant Mary remained upon and cultivated the land, and near the close of the year 1877, was removing from the land a part of its products, some cotton, when Hall attached it for the rent of the year 1877. Judgment was rendered for Hall and defendant has appealed.

The suit originated before a justice of the peace, where judgment was rendered for plaintiff, and defendant appealed. While the cause was pending in the circuit court, it was discovered no affidavit for the attachment was on file, and thereupon plaintiff made an affidavit, that such affidavit was made before issuance of the attachment, and stating that it had been lost or mislaid, and could not be found, and exhibiting a copy of the same, and prayed that it might be substituted for the lost one. This was ordered to be done by the court, and exception was taken, because the affidavit of the loss was not made by the clerk of the court, the custodian of the papers. Perhaps it would have more nearly conformed to the literal requirement of the rule in such cases, to have required the clerk's affidavit, but the file of papers was in court, and no doubt the search was made in the presence of the plaintiff and court, and there was, perhaps, no contest over the fact of the absence of the paper, but perhaps some question made as to whether there had been an affidavit filed on the issuance of the attachment. We think there was no reversible error in allowing the substitution of the last affidavit for the one lost. Upon the trial, Hall was allowed to testify as to his contract with Mary Johnson's husband, over her objections. There was no error in this. The suit was against her in her own wrong, not as his representative, and she claimed under his contract, and it was competent for Hall to show there was no foundation for such claim. If the six years' lease was rated, Hall proves he had bought it, and it also

appeared that it had expired before 1877, the year for which rent was claimed as due from her. After her husband's death, Hall desired her to surrender the possession of the land to him; she refused to do so, and cultivated it in 1877, and Hall elected to treat her as his tenant and hold her responsible for rent, which he had a right to do.

The judgment will be affirmed.

ANDY FOSTER *et al.* v. THE STATE.

CRIMINAL LAW. *Bringing stolen property into this State. Infamy.* A person may be convicted under the act of 1875, ch. 31, for bringing stolen property into this State, but the judgment of infamy cannot be prescribed as part of the punishment.

Case cited: Simpson v. The State, 4 Hum., 459.

FROM SHELBY.

Appeal from the Criminal Court. T. H. LOGWOOD, Judge.

JNO. T. MOSS for plaintiffs.

ATTORNEY-GENERAL HEISKELL for the State.

FREEMAN, J., delivered the opinion of the court.

An opinion was delivered some days since in this case, holding that the bringing of stolen property into this State was not punishable by our courts, unless so declared by statute. Our attention had not been called to the act of 1875, ch. 31, creating this offense, and fixing the punishment, in the case of property under fifty dollars, at confinement in the county jail as a high misdemeanor, and over that sum, in penitentiary for not less than three nor more than ten years. Under that statute these parties were properly convicted; and the judgment heretofore entered will be vacated, and judgment below affirmed. We need only say, that we differ with the attorney-general as to the necessity of passing this law, and we think the opinion of this court, given by Judge Turley in *Simpson* v. *The State*, 4 Hum., 459, the sounder law on the subject—the learned attorney-general to the contrary notwithstanding. The question in the case, however, is, whether the judgment of infamy was proper. This offense is not included in the list of enumerated cases where infamy is prescribed as part of the punishment in the statute creating the offense and making it punishable. We therefore hold that the judgment of infamy cannot be inflicted in this case, and the judgment must be modified to this extent.

DAVID HAMILTON *v.* THE STATE.

CRIMINAL LAW. *Fine and costs. Bond and security for. Remedy.* Where a person has been convicted and fined, and the court accepts his surety given for the same, and he is thereupon released, he cannot be re-arrested at a subsequent term, upon the failure of the sheriff to make the money, and remanded to prison again. The court say: Where security is accepted by the court and defendant discharged, there being no fraud practiced, the remedy is upon the bond or recognizance for the fine and costs.

Code cited: Sections 5239, 5240–41, 5269.

FROM OBION.

Appeal from the Circuit Court. JOS. R. HAWKINS, Judge.

J. G. SMITH for plaintiff.

ATTORNEY-GENERAL HEISKELL for the State.

DEADERICK, C. J., delivered the opinion of the court.

Plaintiff in error was convicted in the circuit court of Obion county of unlawfully selling liquor, and was fined, and for the amount of the fine and costs adjudged against him he gave security and was discharged from custody. Execution issued for the fine and costs against plaintiff in error and his surety, and was returned "*nulla bona*" to a subsequent term. Upon this return, the circuit judge made an order for the re-arrest of the plaintiff in error, and upon his failure

to pay the fine and costs adjudged against him; after he had been re-arrested, he ordered him into the custody of the sheriff until the fine and costs should be paid or secured; and from this judgment an appeal was prayed. The punishment imposed in this cause, by the court, was, defendant should pay or secure the fine and costs, and the surety offered was accepted by the court as a compliance with its judgment, and defendant was discharged. The judgment was final, and the court could only use the execution provided by statute to enforce it. It was not competent at a subsequent term to that at which the fine was imposed and security taken to secure its payment, to arrest the defendant because the sheriff had failed to collect the money on the execution, and put defendant in custody because of such failure. The Code authorized the court to imprison, if fine and costs were not paid or security given; but when security is accepted by the court and defendant discharged, there being no fraud practiced, the remedy is upon the bond or recognizance for the fine and costs, and judgment thereon and the execution. Code, Secs. 5239, 5240–41, 5269.

The judgment of the circuit court will be reversed, and plaintiff in error will be discharged from custody.

I dissent from the foregoing opinion. The court, I think, has the power to enforce its judgment, and take all steps necessary for the purpose. The fine and costs have not been paid, and are not in fact secured. McFarland, J.

R. W. Haywood & Wife *et al.* v. W. T. Currie, Adm'r, and C. F. Read.

Chancery Practice. *Administration. Administrator in collusion with debtor.* If the administrator collude with a debtor of the estate, not to collect a debt from or to recover assets from him, a creditor or distributee of the estate may file a bill to compel a settlement, making the administrator and such debtor defendants.

FROM HAYWOOD.

Appeal from the Chancery Court. H. J. Livingston, Chancellor.

R. W. Haywood for plaintiffs.

A. D. Bright and Lea & Baynes for defendants.

Deaderick, C. J., delivered the opinion of the court.

The bill in this case was filed on the 9th February, 1876, in the chancery court at Brownsville. Complainants and defendant Read are the distributees of Mrs. Elizabeth T. Read, deceased, and defendant Currie is her administrator. Mrs. Read died in May, 1875, and Currie was appointed and qualified as her administrator in July thereafter. The bill charges that defendant Read is largely indebted to the estate of Mrs. Read; that complainants had applied to the administrator to bring suit to compel defendant Read to account for his dealings with and indebtedness to the estate, but the said administrator "fails and refuses

to cause said C. F. Read to make any settlement of his indebtedness aforesaid, and in fact is colluding with said defendant, so as to enable him to evade the payment of his indebtedness to said estate, and refuses to join in this bill as complainant." The bill proceeds to specify the amounts and items for which said defendant Read should be held to account, and prays for a decree for such sum as may be found due and for general relief. To the bill each of the defendants puts in a plea, denying that said administrator fails or refuses to cause said C. F. Read to make any settlement of his indebtedness to the estate, and also denying the collusion charged. The complainants thereupon set said pleas down for argument, and for judgment of the court upon their sufficiency. And the chancellor adjudging the pleas good in form and substance, the complainants took issue upon them. Upon the hearing of the issues made up upon the truth of the pleas, the chancellor determined against their truth, and allowed defendants to answer further. But by consent of complainants and by leave of the court, the defendants were allowed to appeal to this court, and the cause is here for our determination, as to the correctness of the chancellor's decree.

The ground of objection to sustaining the bill in this case is, that a creditor or distributee cannot maintain a bill against a debtor to the estate, or one having the funds or assets of the estate in his hands; but such debtor or wrongful possessor of such funds or assets, is liable only to the administrator, and he alone has the right to bring suit for their recovery.

Ordinarily, this is true; but to this general rule there are exceptions, as where there is collusion between the creditor and the administrator; or where the latter is insolvent; and also in cases of partnership, if the survivors are insolvent, a creditor may maintain a bill against the personal representatives of a deceased partner, and join the survivors as parties; so, also, third persons, who possessed themselves of the estate of the deceased, or are his debtors, whether there be collusion or not between them and the administrator, may, under special circumstances, be made defendants with the administrator or executor, at the suit of a creditor's legatee or distributee; and if the executor or administrator refuse to collect an outstanding debt, or fund belonging to the estate, such a case falls within the principle of the rule. Story Eq. Pl., secs. 227, 178 and notes, citing the cases.

But it is said the evidence does not sustain the finding of the chancellor, upon the issue of fact made upon the plea. It is true that there is no evidence of any agreement or understanding between the defendants, that the administrator would not seek any recovery against his co-defendant; but there is evidence that at the request of part of complainants, he refused to institute any suit against defendant Read, or to join with them in doing so, or to allow them to use his name for such purpose, although they offered to provide security for the prosecution of the suit. Whether the defendant Read is indebted to the estate, or whether he has any of the assets belonging thereto, cannot now be determined; but the bill makes a

prima facie case of liability, and the liability of complainants for cost, if they fail to sustain the claim set up, is a sufficient guarantee that the suit is prosecuted in good faith. We cannot say that seven months after the grant of administration was not long enough to enable the administrator to determine whether he ought to bring suit against his co-defendant; nor, after the lapse of that length of time and his refusal to sue, that the distributees were bound to wait on him for any definite time thereafter, to commence suit.

Upon the whole case, we think the chancellor's decree was correct and affirm it, and remand the cause for further proceedings.

J. B. TATUM *v.* E. B. CURTIS *et al.*

JUDGMENTS AND DECREES. *Office and officers. Service of process. Chancery practice.* A judgment cannot be vacated in chancery, on the simple, unsupported evidence of the judgment defendant, that he was not served with process, where the writ shows the officer's return, though he may not remember the fact of service.

FROM CROCKETT.

Appeal from the Chancery Court. JOHN SOMERS, Chancellor.

COOPER & BUCHANAN for plaintiff.

W. F. POSTON for defendants.

McFARLAND, J., delivered the opinion of the court.

Bill to enjoin judgment rendered by a justice against complainant, upon the ground that he was not served with process. The warrant shows a regular service. The complainant, in his deposition, says he was not served. The officer says he has no recollection aside from his return, but is satisfied from this that he did serve the warrant, as he was always particular to make his returns according to the facts. There is no other and very pertinent testimony; the facts and circumstances are not fully developed. The *onus* of proof is upon the complainant; his own testimony but counterbalances that of the official act and testimony of the officer. It would not do to set aside the judgments of courts and the official acts of officers, upon the simple denial of the service by the party himself, unsupported.

Decree affirmed.

The State v. Hans Margerum and Fred Seymour.

Criminal Law. *Venue. Property taken in one county but carried into another.* The defendants in this case were, at the time they committed the offense, prisoners, and in charge of an officer, who was taking them to Memphis from Jackson, where they had been tried and remanded to Shelby county for rehearing, and when in Fayette county on their way, they took from the person of the prosecutor his watch, and carried it to Shelby county. *Held*, that they were properly tried in Shelby county for this offense, as they knew they were certainly going to Shelby county, under the circumstances, and the carrying of the goods to that county, in such case, was not involuntary.

FROM SHELBY.

Appeal from the Criminal Court. T. H. Logwood, Judge.

Attorney-General Heiskell for the State.

L. B. Horrigan for the appellants.

Freeman, J., delivered the opinion of the court.

The only question in this case is, whether the parties could be rightfully tried in Shelby county, the original taking being in Fayette county. The facts are, that the parties were obained together, and in custody of the sheriff of Madison county, being carried from this county to the jail of Shelby county, to which they had been remanded by order of the court

for new trials granted in their cases. The prosecutor, one Curry, was in the car where the prisoners were, when the defendants got into a difficulty with him, and robbed him of his watch and chain. They carried it on to Shelby county, where it was taken from the possession of another prisoner who was along with them in the cars. It is insisted this was not a voluntary carrying of the property into Shelby county, so as to make the parties indictable in that county, but that Fayette county is the county of the venue.

In support of this view, the case of *Rex* v. *Simmonds*, Moody's Cr. Cases, vol. 1, 408, is cited. In that case the prisoner was indicted in the county of Kent for stealing two horses. He was apprehended in Surrey, and stated he had been to Dorking to bring the horses, and they belonged to his brother. The police officer then proposed to go to Bromley with him, in order to ascertain the fact. After going part of the way, the defendant said he had left a parcel at some place in Kent, whereupon the police officer went to Kent with him. When they arrived at the designated place, the horses were put up, and the prisoner escaped, but was afterwards arrested and tried in Kent. It was held by the judges of England, that there was no evidence of stealing in Kent, and that the prisoner was only triable in Surrey, where the horses were taken.

This is all very well, but does not meet this case. Here the prisoners stole the articles while in custody of the sheriff, with the purpose of carrying them to Shelby county, their certain destination. The watch

and chain were so carried in pursuance of their purpose, so that the carrying into Shelby was as much their voluntary act as if they had been free from custody, and had stolen the articles in one county with the design of carrying to the other—in fact it was more certain in this case that the articles would be carried to Shelby than if they had been free, and the purpose is equally clear. We do not think this objection tenable, and the proof being clear, the case is free from doubt.

The judgment must be affirmed.

Burton *v.* Robinson.

Redemption. *Sale of land. Pleading and practice.* A tender of the proper amount of money, to the purchaser of land, sold under a deed of trust, with an offer to give the credit on his judgment, by a *bona fide* creditor, who seeks to redeem, is sufficient to secure his right against such purchaser, though the tender be refused by him.

Cases cited: Hill *v.* Walker, 6 Col., 432; Carden *v.* Spillman, Thompson's Tenn. Cases, 25.

Code cited: Sections 2127, 2128, 2131a.

FROM MADISON.

Appeal from the Chancery Court. H. W. McCorry, Chancellor.

CARUTHERS & MALLORY for plaintiff.

CAMPBELL & JACKSON for defendant.

FREEMAN, J., delivered the opinion of the court.

The question in this case is, whether complainant is entitled to enforce a redemption of a certain tract of land sold under a deed of trust, and purchased by defendant, on the 3d of January, 1876. It is satisfactorily shown that Burton, being a judgment creditor of H. & M. Byrum, who were the makers of the deed of trust, tendered the proper amount to Robinson, who at first agreed to accept it, and afterwards declined to do so; that he also proposed to credit two judgments, each with four hundred dollars, this being more than ten per cent. on the amount bid for the land. It is proper to say, that complainant went further in this case, by executing a receipt for the amount so proposed to be advanced by him, acknowledging it before the clerk of the county court, and had it registered. This was done probably in compliance with Sec. 2127 of the Code; but this cannot aid him in this case, that section only applying to the *bona fide* creditor, by judgment, decree or debt acknowledged by deed, who purchases the land, who may in twenty days, propose to advance his bid. The real or main question at least, in the case is, whether a tender of the money to the purchaser, with an offer to give the credit on his judgment, by a *bona fide* creditor who seeks to redeem, is effective to secure his right against the purchaser where the tender is refused, but the

credit is not in fact in in any way given to the original debtor, or entered on the judgment proposed to be credited. The reasoning of the judge delivering the opinion, in the case of *Hill* v. *Walker et als.*, 6 Col., 431–2, certainly goes to the point of bolding that a "creditor proposing to redeem, must not only give the credit, but must do this by some positive act; and if the credit is not given and proved, the right to redeem is not acquired." The judge adds, "the actual giving the credit is a condition precedent to the existence of the equity to enforce redemption." This was said in a case where a judgment creditor proposed to redeem, tendered the money, and offered to credit a sufficient sum on his jndgment as required by the Code, the right to redeem being denied and tender refused. The question was not in judgment before the court, however, as the answer made no response to this last allegation as to offer to redeem, and no proof was made of the fact, and the court had disposed of this question by saying, "no proof being made of the alleged offer to credit, it cannot be taken that such offer was made or credit given." If no such offer then was shown, the question of the effect of such an offer made, when the tender was refused, was not before the court for adjudication. We now have the case before us, where such an offer was made at the time of the tender of the money, and must decide the question. By sec. 2128 of the Code, it is provided, "a *bona fide* creditor who redeems from the purchaser at the sale, shall hold the property subject to redemption by the original debtor or any other of

his creditors, upon the same terms on which it was redeemable in the hands of the first purchaser, or any person claiming under him; that is to say, by the party proposing to redeem paying or tendering to the person holding the land the amount of money paid, or credited by him as aforesaid, with interest, and also agreeing to pay to the debtor the further sum of ten per cent. or more on the sum bid for said land when sold, or crediting him with that amount or more on the debt owing to him by said debtor." By section 2131*a* of the Code, it is provided, that "the person proposing to redeem shall always pay or tender to the holder of the land, the amount of money lawfully paid by him, with interest at the rate of six per cent. per annum; and if he be a creditor, shall pay to the debtor, or credit his debt with a sum equal to ten per cent. or more, on the sum bid at the original sale, or with a sum equal to ten per cent. or more upon the judgment of said creditor, at the election of the creditor." Act of 1859–60, ch. 84.

Taken literally, these sections certainly require the payment of the ten per cent. or more, or a credit upon the judgment of this amount, in order to effectuate a redemption. They would seem to support the view of the judge in the case from 6th Col. Reps., but on careful consideration, we think it is going too far to hold that these sections require this credit to be given, where the tender is refused, and the redemption thus prevented in fact, and suspended for the time, the party being compelled to go into a court of chancery to enforce his redemption.

Burton v. Robinson.

This suit is brought against the purchaser alone of the land; it is a right against him alone, and it is brought to compel him to accept the money, and effectuate the right which is acquired by the tender. The credit is but an incident to the payment of the money, and the sum to be thus credited should not in fairness be credited in fact, unless the redemption is completed by acceptance of the money tendered; it is idle to require the credit, the concluding act, when the first has been defeated by refusal of the purchaser to accept the money tendered. That this was not intended by the Statute, is shown by the fact, that no mode of giving this credit is pointed out, nor does the opinion we have referred to indicate definitely how it shall be done. In addition to this we can see how it might embarrass the *bona fide* creditor, if required to enter a credit on his judgment, or give a receipt to the original debtor in advance, as he may fail to succeed in his suit for redemption, and then be put to the trouble and expense of getting clear of the credit or receipt thus given. If he does succeed, then the decree of the court enforcing his right can direct the credit to be given and entered properly, and this ought properly to be done at the end of the proceedings, and not while it was in a state of uncertainty. For these and others reasons that might be given, we think the actual giving of the credit is not necessary in a case like the present, in order to enable a party to enforce his right to redeem, as against the purchaser refusing the money when tendered. A court of equity in such case can well apply the

maxim that, what the party proposed and offered to do, and was prevented. from doing by his opponent, shall not work him any wrong.

We find that this court, in the case of *Carden* v. *Spillman et als.*, Thompson's Tenn. Cases, p. 25, opinion by Judge Greene, held, that a refusal to treat with a party seeking to redeem, does away with the necessity of an actual tender, and also with the necessity of offering to credit the judgment as required by the statute; and on the same principle we hold, the refusal to accept the tender of the money dispenses with the necessity of actually entering the credit, the party proposing to do so, if his offer is accepted.

We think there is nothing in the fact that the judgments offered to be credited were in the name of Burton and wife. He had the right to collect them, or he might be treated as the agent of the wife, if necessary, in such a case. Nor do we think there is anything in the exception to the proof of a subsequent tender a day or two after the day averred in the bill. It was all but a part of the same transaction, which the defendant refused, and the particular day was not important, both being in time allowed by law.

Affirm the decree of the chancellor with costs.

W. J. Walpole v. The State.

Criminal Law. *Kuklux law. Section 4770 of the Code construed.* The prisoner was indicted under Section 4770 of the Code and convicted. The indictment reads as follows: "The defendant on the 5th day of November, A. D., 1877, in the county and jurisdiction aforesaid, then and there unlawfully and feloniously being masked and in disguise, unlawfully and feloniously then and there did enter upon the premises of one Ellis Davis, in said county situate, against the peace and dignity of the State." The facts were, that the prisoner entered the hen-house of the prosecutor, for the purpose of stealing chickens, as acknowledged by himself. *Held*, that the indictment was proper and the conviction correct.

Case cited: The State v. Box, MS., Jackson, 1875.
Code cited: Section 4770.

FROM GIBSON.

Appeal from the Circuit Court. G. B. Black, Judge.

McDearmon & Tyree for plaintiff.

Attorney-General Heiskell for the State.

Sneed, J., delivered the opinion of the court.

The defendant appeals in error from a conviction and judgment under what is commonly called the ku-klux law. The act under which he was convicted is in the words following: "If any person or persons

disguised or in mask, by day or by night, shall enter upon the premises of another, or demand entrance or admission into the house or inclosure of any citizen of this State, it shall be considered, *prima facie*, that his or their intention is to commit a felony, and such demand shall be deemed an assault with an intent to commit a felony; and the person or persons so offending shall, upon conviction, be punished by imprisonment in the penitentiary, not less than ten years nor more than twenty years." Act 1869–70, ch. 54, sec. 2, T. & S. Rev., sec. 4770.

The indictment in this case charges that the defendant "on the 5th day of November, A. D., 1877, in the county and jurisdiction aforesaid, then and there unlawfully and feloniously being masked and in disguise, unlawfully and feloniously then and there did enter upon the premises of one Ellis Davis, in said county situate, against the peace and dignity of the State." The facts are, that the defendant in disguise, so that he could not be recognized until the mask was taken from his face, was caught in the hen-house or chicken-coop of the said Ellis Davis, which was upon the premises and within the yard of said Ellis Davis, and that when so surprised and captured, he confessed his purpose to rob said chicken-house.

It is insisted that the indictment does not charge any indictable offense. It is apparent that the object of this statute was to repress a great evil which arose in this country after the war, and which grew to be an offense of frequent occurrence, that of evil-minded

and mischievous persons disguising themselves to terrify or to wrong those who happened to be the objects of their wrath or resentment. This was a kind of mob law, enforced sometimes by a multitude of vagabonds, who grew to be a great terror to the people, and placed human life and property at the mercy of bad men, whose crimes could scarcely ever be punished, because of the disguises under which they were perpetrated. There were laws already sufficiently rigorous and severe for the due punishment of any and all offenses which might be committed without disguises; and this act of 1869–70 was intended to strike at offenses committed in masquerade; to make these more highly penal because of the inherent difficulty of identifying offenders who wore masks in order to secure immunity from detection. The mere entry in disguise upon the premises of another is made *prima facie* evidence of an intention to commit a felony, and this of itself is a substantive offense, from which there is no escape, except by proof that there was in fact no purpose to commit crime. In this case we have not only the *prima facie* case, but the conclusive case of an intent to commit a felony, by the confession of the prisoner. The very point now made on behalf of the prisoner was adjudged by this court in the case of *The State* v. *Box & Brest*, decided in 1875, MS., Jackson. In that case the indictment charged the defendants in the words of the statute, with an unlawful and felonious entry upon the premises of one Hall Hill, masked and in disguise, and demanded en-

trance or admittance into the house or inclosure of the said Hall Hill, with the intent to commit a felony. In that case the indictment had been quashed below, and it was adjudged here that it was properly quashed, because in a single count it charges two several offenses. "We are of opinion," say the court, "that the statute makes it a felony to enter upon the premises of another disguised or in mask; and to demand in mask or disguise, entrance or admission into the house of another, is likewise a felony; and also to demand entrance into his enclosure, masked or disguised, is a felony; and the person or persons doing either of said acts subjects himself to the penalty prescribed in the statute." This is the point determined in that case, and it must be held decisive of this. The penalties of a violation of this law are severe, but they have proved themselves wholesome in the partial suppression already of one of the greatest of the disturbing elements of social order in this State.

Affirm the judgment.

WILLIAM LEWIS *et al.* v, MAHON & GOODLOE.

LANDLORD AND TENANT. *Lien. For supplies furnished. Tenant, etc.*

The act of 1875, ch. 116, gives the landlord a lien on the crop for necessary supplies of food and clothing furnished the tenant, without any written contract therefor.

Code cited: Section 3542*a*.

FROM CROCKETT.

Appeal from the Circuit Court. G. B. BLACK, Judge.

COOPER & BUCHANAN for plaintiffs.

W. J. MCFARLAND for defendants.

SNEED, J., delivered the opinion of the court.

This case involves the construction of the acts of 1870, ch. 121, sec. 1, and 1875, ch. 116, which gives to the landlords a lien upon the crops produced on leased or rented lands, to indemnify them for supplies furnished their tenants. The act of 1870, ch. 121, s. 1, is in the words following: "Any debt by note, account or otherwise, contracted for supplies, implements of industry (husbandry), or work stock furnished by the owners of land, to lessees, or by lessees to sub-tenants, and used in the cultivation of the crop, shall be and constitute a lien upon the crop growing

or made during the year upon the premises; provided the said lien is expressly contracted for on the face of the note or writing between the owner of the land and lessees, or between the lessees and sub-tenants; and provided further, that the agreement or contract so entered into shall not have priority of lien over the lien of the owner of the land for the rent." T. & S. Rev., sec. 3542*a*. The act of 1875, ch. 116, is entitled An act to amend an act passed January 12, 1870, ch. 121, sec. 1, granting furnishers of supplies a lien on crop, and provides that chapter 121, sec. 1, of the act passed 12th January, 1870, be so amended as to give landlords, in addition to liens already given them by law, a further lien on the growing crop for necessary *supplies of food and clothing* furnished tenants for themselves or those dependent on them, by the landlord or his agent, to enable the tenant to make the crop; provided an account of such necessary supplies is kept, as the articles are furnished, and sworn to before some justice of the peace, before the enforcement of the lien; provided also, that this lien shall be secondary to that of the landlord for his rent. The second section of this act provides that this lien may be enforced as the landlord's lien for rents; provided always, that the affidavits as above provided for, shall be made as to the truth and justice of the account, before the magistrate or clerk of the court shall issue writs of distraint or attachment. Acts 1875, ch. 116.

The facts of the case in judgment are as follows: The plaintiff in error, William Lewis, in the year 1876, furnished Williams with supplies necessary to

make the crop of that year made by Williams, the tenant, on the land of Lewis. There was no written contract or agreement between the parties touching the supplies; but they were duly furnished and an account thereof kept by Lewis. In October, 1876, the crop of cotton having been gathered, ginned and baled, it was levied upon by Mahon & Goodloe, under a judgment against Williams, and as his property. After this levy, Lewis made out an itemized account of the supplies furnished Williams, and had the same duly proven, and claims the cotton under the provisions of the act of 1875, ch. 116. Upon a case agreed, the circuit judge held that the levy gave the better right.

It is an elementary rule in the construction of statutes, that where there are several enactments upon the same subject matter, they must all be considered in order to ascertain the sense of either. It is another elementary rule, that repeals by implication are not to be favored, but that the last utterance of the legislative will upon any given subject must be taken as a repeal of the former, if there be such a repugnance that they cannot stand together, notwithstanding there be no express words of repeal. Now it is manifest that it was intended by the act of 1875, ch. 116, to modify the act of 1870, ch. 121, so as specially to favor those landlords who fed and clothed their tenants during the cultivation of the crop. The act of 1870, ch. 121, applies to supplies generally of whatsoever nature, and to implements of industry and work stock furnished, and requires that the lien shall be contracted for in writing; while the lien given by

the act of 1875, ch. 116, for supplies of the absolute necessaries of life, by the express terms of the statute, need not be contracted for in writing, but the same is secured to the landlord upon keeping an account thereof and duly proving the same before enforcement.

We hold, that so far as the supplies by a landlord of food and clothing are concerned, the act of 1875, ch. 116, was intended to secure the lien without written contract, and upon a simple compliance with its terms. Any other construction would render the legislation upon this subject senseless and incongruous, and the act of 1875, ch. 116, useless and supererogatory.

Let the judgment be reversed, and judgment entered here in favor of the appellant.

KNOXVILLE, ... SEPTEMBER TERM, 1876.

Welcome Hodges & Wife and Louis Spoon & Wife v. Samuel Gill.

Deed of Trust. *Sale of land. Under after death of maker. Right to proceed not waived by judgment at law. Rights of parties.* The power of a trustee to sell land for the purpose of paying a debt, is a power to sell coupled with an interest, and is not revoked by the death of the maker of the deed. The creditor secured by the deed may proceed against the trust property as the primary fund, whether before or after the death of the debtor; and this right is not waived by obtaining a judgment at law.

FROM GRAINGER.

Appeal from the Chancery Court. H C. Smith, Chancellor.

A. S. Tate and J. G. Rose for plaintiffs.

J. T. Shields for defendant.

McFarland, J., delivered the opinion of the court.

Isabella McGouldic conveyed certain lands to James T. Shields in trust to secure two debts to Sam'l Gill. The deed containing the usual power to sell if the debts are not paid in one year. Mrs. McGouldic died, leaving part of the debts thus secured unpaid.

Gill sued the administrator of Mrs. McGouldic's estate and obtained judgment for the balance of these debts, and also for other debts not secured. Afterwards, the trustee sold the land under the deed, Gill becoming the purchaser, to whom the trustee made a deed, and who recovered the land in an action of ejectment from the heirs of Mrs. McGouldic. Thereupon this bill and amended bill were filed—Mrs. Hodges and Mrs. Spoon, being daughters of Mrs. McGouldic. The bill contains many allegations of fraud upon the part of Gill in obtaining the deed of trust and causing the sale of the land; but the argument here is narrowed down to two questions:

First. It is maintained for the complainants, "that real estate conveyed in trust to secure the payment of debts, cannot be sold under the deed of trust after the death of the maker of the deed, without first exhausting the personal assets." This proposition has been supported by an earnest and able argument, which at present we cannot review, but we hold that the proposition is not maintainable. By the deed of trust the title to the land is conveyed to the trustee with a power of sale, for the purpose of paying the debt. This power to sell is coupled with an interest and is not revoked by the death of the maker of the deed. The creditor thus secured may proceed against the trust property as the primary fund, whether before or after the death of the debtor, and this right is not waived by obtaining judgment at law. The equity of redemption which descends to the heirs may not be subjected to the payment of debts without ex-

hausting the personal assets. See Abbot's U. S. Digest, vol. 9, p. 349.

The next question made is, that as the land at the trust sale brought a larger sum than the debts secured by the deed of trust, the trustee was not authorized to allow Gill, the purchaser, to retain the surplus on other debts due him from Mrs. McGouldic, not embraced in the trust deed. The deed in terms provides that such surplus shall be paid to Mrs. McGouldic or her representative, and the trustee, of course, is accountable to the personal representative of Mrs. McGouldic for the surplus; but this does not affect Gill's title; and as neither the trustee or the administrator of Mrs. McGouldic are parties to the cause, there can be no decree in regard to this matter.

The decree of the chancellor dismissing the bill, will be affirmed with costs.

W. P. Newman *et al. v.* P. W. Ashe *et al.*

1. Corporations. *Power of to purchase land.* While it is the better rule to construe strictly the power of corporations, still it was within the corporate powers of the city of Knoxville to purchase and own land outside the city limits, for water reservoir purposes.

2. Same. *Title not divested by change of purpose.* Land being purchased for such a purpose, the title vested in the city, and was not divested by a change of purpose.

3. SAME. *Failure to perform a minor consideration will not forfeit the title. When.* Land conveyed for a fair consideration does not revert to the bargainor because some outside consideration has not been performed, when there is nothing in the deed to show that such failure was, by the contract, to forfeit the title.

4. SAME. *Ejectment. Right to re-enter. Who may.* The right to re-enter is reserved to the bargainer and his heirs and not to his grantees.

FROM KNOX.

Appeal from the Circuit Court. E. T. HALL, Judge.

CALDWELL & WASHINGTON for plaintiffs.

CORNICK BAXTER for defendants.

McFARLAND, J., delivered the opinion of the court.

This is an action of ejectment, brought to recover a lot of land two hundred feet square, lying within the present corporate limits of the city of Knoxville. The plaintiffs having failed in the action, bring the cause to this court for revision. It is conceded that the land was formerly owned by Calvin Morgan, and both parties claim title through him. On the 6th of December, 1838, said Morgan conveyed the lot in dispute to the mayor and Aldermen of Knoxville, for the purpose of erecting a *reservoir* thereon. This deed was duly registered. No reservoir was ever erected, however, and the city authorities afterwards sub-divided the lot and sold and conveyed to various parties—the several defendants to this action and others through whom they claim.

Calvin Morgan died between the years 1850 and 1852, and on the 12th of February, 1853, the executor of his will conveyed to John Fouche twenty-five acres of land, including the land in dispute. On the 22d of April, 1853, Fouche conveyed to Jacob Newman, Tazewell and W. G. Newman, a lot the boundaries of which also include the disputed land.

This deed, after giving the boundaries, uses this language: "Containing, (after deducting two hundred feet square, heretofore sold by Calvin Morgan, sr., to the corporation of Knoxville for a reservoir lot), six acres 99–100 poles." In another part of the deed, the bargainer quit claims to the bargainees all his title to said two hundred feet square, but without warranting the title. The action is brought by W. G. Newman and the heirs of Jacob and Tazewell W. Newman.

It is manifest upon this statement, that if the deed of Calvin Morgan to the mayor and aldermen, of the 6th December, 1838, be valid, and nothing else appearing, the title of the defendants is superior.

The plaintiffs therefore maintain: 1st, that this deed was inoperative and void, because the land at the time was without the corporate limits of the city of Knoxville, and the corporate authorities had no power under the charter and laws to purchase and take the title to such land; and 2d, if this be not so, that the title of the city was lost by reason of its failure to perform the conditions contained in the deed, and the title thereby reverted to the grantor and passed to them under their deeds.

These questions were determined against the plaintiffs by the circuit judge.

Upon the first question, a strict construction of the powers of municipal corporations may be conceded as the safer rule, and that such corporations must act within the powers of their charters, and to carry out the legitimate purposes of their creation; and the power to purchase real estate for the purposes of speculation could certainly not be inferred from the general powers contained in city charters. But the act of the 19th January, 1838, while it does not in express terms give the power to purchase and hold real estate outside of the corporate limits for the purpose of constructing water-works, yet it does so by necessary implications. The power to construct water-works—a legitimate corporate purpose—is expressly given, and the authority is given to the mayor and aldermen "to protect from injury by adequate penalties, . . . the pipes, hydrants or fixtures, buildings or improvements belonging to or in any way appertaining to said water-works, *whether within or without the limits of said corporation.*"

We think it requires no latitude of construction to hold that the corporate authorities had at the time the power to purchase and take the title to the lot for the purpose indicated; and this being so, the deed is not on this account void, although no water works were ever constructed upon the lot in question. The purchase having been made in accordance with the power and authority then existing, the title passed, and was not defeated by reason of a change of pur-

pose on the part of the corporate authorities as to constructing water-works upon the land.

To determine the next question, it is necesary to notice the material parts of the deed in question, as follows: "The said Calvin Morgan, for and in consideration of the sum of one thousand dollars to him in hand, the receipt of which is hereby acknowledged, and for and in consideration that the said mayor and aldermen hereby agree, as soon as conveniently practicable, to erect for said Morgan's use, a hydrant within ten feet of the descending pipe from the reservoir contemplated, furnishing water sufficient for the domestic consumption of one family, hath granted, etc., etc., to the mayor and aldermen of Knoxville, for the use and benefit of said town, and for the purpose of erecting a reservoir thereon, a certain tract of land," etc., etc., with the privilege of ingress and egress, etc. It is argued that the failure of the corporation to erect the reservoir and hydrant within the time indicated was a breach of the condition upon which the land was conveyed, and gave to Morgan the right to avoid the conveyance by a re-entry. We hold that this is not a proper construction of the deed; that the conveyance was absolute and unconditional; that the undertaking of the mayor and aldermen to erect the hydrant was a part of the consideration of the conveyance, and Morgan might or might not have had his remedy for the non-performance of this undertaktaking; but there is nothing in the deed to show that a failure to perform this undertaking was to forfeit the title to the land, or cause it to revert to the

grantor. Where a fair consideration, as in this case, has been paid outside of the undertaking in question, courts would certainly not imply a condition that the title is to be forfeited by a non-compliance of the further undertaking of the bargainees. Such conditions would have to be clearly expressed; the language of the deed showing that the conveyance was for the purpose of erecting a reservoir thereon, as standing alone, no other significance, then to show that the purchase by the corporate authorities was within their power and for a legitimate purpose.

We think this holding will be bound to be in accordance with the authorities upon the subject. Shephard Touchstone, p. 127. If it were conceded that the deed is subject to the construction contended for, the authorities hold that the right to enter or avoid the deed is reserved only to the bargainer or his heirs, and does not pass to his grantee. 4 Kent, p. 127; Washburne on Real Property, 1 vol., pp. 450, 451.

We think there is nothing to show any attempt upon the part of Morgan or his heirs or representatives to assert the right of re-entry, though he remained in possession some years after the conveyance.

We think there is no error in the record, and the judgment will be affirmed.

JOHN BROWN AND WIFE v. E. Z. C. HARRIS *et al.*

NUNCUPATIVE WILL. *Probate. Setting aside. Notice.* The probate of a nuncupative will in the county court is, in substance, under our statutes, required to be in solemn form; and such probate ought not to be set aside upon petition merely because of the absence of the process or notice from the record, where the want of notice is not averred in the petition. The recital of the record that the next of kin were notified to appear is sufficient to show the fact of notice.

FROM MONROE.

Appeal from the Circuit Court. E. T. HALL, Judge.

R. K. ROBINSON and C. W. HICKS for plaintiff.

MCCRASKY for defendant.

MCFARLAND, J., delivered the opinion of the court.

The nuncupative will of Matilda Roy was admitted to probate in the county court of Monroe county, at the June term, 1875. Subsequently, at the September term, upon the petition of the next of kin or some of them, the probate was set aside, and the will and proceedings certified to the circuit court for an issue and contest in the usual form. In the circuit court, the administrator with the will annexed moved to dismiss the petition and annul the action of the county court setting aside the probate. This motion was

sustained and the will was declared valid under the probate of the county court, and the matter remanded to that court to be proceeded with. The contestants have appealed.

The argument in support of the action of the circuit court is, that the probate of a will had in *solemn form* cannot afterwards be set aside, and that under our laws the probate of a nuncupative will is a probate in *solemn form* by the express requirements of the statute. If the next of kin when notified to be present at the probate in the county court fail to contest and ask for an issue to be made, they cannot afterwards have the probate set aside. This, so far as we know, is a new question in this State. A probate in common form is the usual mode of proving wills in the county court; that is, wills other than nuncupative wills, may be set aside upon the petition of the parties in interest, and issue made for trial in the circuit court, even after the lapse of many years. But a probate in solemn form cannot be thus set aside. A probate in solemn form may be had in the county court by citing all who are interested to be present at the probation, and in their presence the will is offered for probate, and the witnesses all examined, and the judgment of the court thereon establishes or rejects the will.

Section 2166 of the Code, from the act of 1784, enacts, "that no nuncupative will shall be proved by the witnesses . . . . till process has issued to call in the widow or next of kin, or both if conveniently to be found, to contest it." This in substance requires

the probate of such a will to be in solemn form, and we do not see but what the same results would follow as to the right to have the probate set aside which attach to other wills proven in solemn form.

The record of the county court shows that the will of Matilda Roy was produced in open court at the May term, 1875, for probate, when it was ordered that the probate be continued until the June term, and that process issue as to all resident defendants, and publication be made as to all non-resident defendants next of kin, notifying them that the will would be offered for probate at the June term. The record shows that a number of persons, including all the petitioners except Mary E. Barr, (who was a niece of the testatrix) and her husband, by writing signed by attorney, waived service of process to appear at the June term, and at the June term the record recites that the next of kin were notified to appear on the day of the probate.

The petition assumes that the probate of the will in the county court was in common form, but does not in terms aver a want of notice. Is the recital of the record that the next of kin were notified sufficient to show the fact? Should the record affirmatively show the service of the process? The requirement of the statute is, that "*process*" shall issue, etc. "Process" ordinarily would mean process issued by the clerk, which should constitute part of the record, but the mere absence of the process or notice from the record, where the fact of notice is recited, ought not to vitiate the probate, where want of notice is

not averred. The probate of a will is a proceeding in rem; and while we think parties in interest who had no notice ought not to be denied their right to contest, yet when the record shows a case of probate in solemn form and no want of notice averred, that the probation ought not to be set aside merely because of the absence of the process or notice from the record.

Affirm the judgment.

J. C. HENDRIXSON, in error, v. P. H. CARDWELL.

LANDLORD AND TENANT. *Emblements.* A tenant occupying premises under a lease not for a definite period, sowed a crop of oats in November, 1872, harvested them in 1873, and plowed in the stubble to get a new crop. His tenancy was terminated the first of September, 1873, without objection or reservation by him. *Held*, that he was not entitled to enter and gather the crop of oats in June, 1874.

FROM KNOX.

Appeal from the Circuit Court. E. T. HALL, Judge.

W. A. HENDERSON for plaintiff.

L. C. HOUK and T. J. WEBB for defendant.

McFARLAND, J., delivered the opinion of the court.

This was an action of replevin brought by Cardwell to recover a lot of oats. The facts deposed to by the plaintiff, and J. B. Hoxsie, witness for the defendant, are, that Hoxie, as agent of Dr. Pearne, rented to the plaintiff certain premises near Knoxville, being a house and about twenty acres of land. The plaintiff says he rented "at twelve dollars and a half a month, payable in advance, but by the year, in the month of March, 1872, and remained until the 1st of November, 1873. I expected to keep the place four or five years, as Dr. Pearne was absent from the country, and I expected to keep it until his return." Hoxsie says "he rented the place to the plaintiff at twelve dollars and fifty cents per month, the renting was not by the year or even for any definite time."

In November, 1872, the plaintiff proves that he sowed on the land a crop of English winter oats and harvested the same in June, 1873, when he plowed in the *stubble* so as to get another crop, which was the custom, and the crop was growing when he left the place, November 1st, 1873. In June after plaintiff left, defendant cut and harvested the oats for which the suit is brought.

Hoxsie was offered better terms by the defendant, who proposed to take the premises for a longer lease, and this was the reason the plaintiff's tenancy was terminated. The plaintiff gave up the premises without objection and made no mention of the growing oats crop, and none was made by Hoxsie upon leav-

ing to the defendant. The question is, do these facts entitle the plaintiff to a recovery?

The argument for the plaintiff is, that he was a tenant at will, and his term having been terminated by his *landlord*, he was entitled to the growing crop as emblements and free egress, etc., to cut and carry the crops away. The general principle is not doubted. See 2d Blackstone, p. 126. But if the plaintiff was a tenant from year to year, as his own testimony indicates, he would not be entitled to the emblements after the year which terminated his tenancy. Though, as the judge charged in this case, if the landlord suffered the tenant to hold over after the termination of the first year, the presumption would be that the tenancy was to continue for another year, and if the landlord terminated the tenancy before the expiration of the second year, the tenant should have to the end of the year to remove his crops, but we think not beyond the end of the year, as is to be implied from the judge's charge. For in a case of tenancy from year to year, where the term depends upon a certainty, if the tenant holds to the end of the year, he cannot have emblements unless specially reserved. Broom's Legal Maxims, p. 396. And so, if his term is by the landlord wrongfully terminated before the year, his right to emblements could not extend beyond the year, his right in this respect could not be increased by the termination of his tenancy before the end of the year.

But another question is, whether the crop is of that character secured to tenants in such cases.

When the tenancy is of uncertain duration and is terminated by the landlord after the crop is sown, but before it is severed from the freehold, the tenant or his representative shall be entitled to one crop of that species only, which ordinarily repays the labor by which it is produced within the year within which that labor is bestowed, though the crop may in extraordinary seasons be delayed beyond that period. But he is not entitled to all the fruits of his labor, as such right might be extended to things of a more permanent nature, such as trees or more crops than one, since the cultivator very often looks for a compensation for his capital and labor in the produce of successive years. Such is the law, as stated in Broom's Legal Maxims, pp. 236 and 394.

The crop claimed in this case is, ordinarily, an annual crop, but the plaintiff harvested the first year's product of the sowing, and claims a second year's crop of the same sowing. True, he bestowed additional labor to produce this second crop, but as we understand the rule as above stated, it goes no farther than to give to the tenant the benefit of the law of emblements, so as to secure to him the benefit of the annual crop sown by him before the termination of his term. If this second crop of oats had grown without labor by the plaintiff, he would not have been entitled to it after the expiration of his term, as he had already harvested the crop sown by him, and the additional labor bestowed upon it does not change the result. The crop claimed matured in 1874, was sown in November, 1872. Plowing in the stubble, we

think, is not equivalent to sowing another crop, though it produce the same result. The policy of the rule is the encouragement of the tenant in the cultivation of the soil, and is satisfied by giving him, after the termination of his term, the proceeds of his annual crop sown by him.

Let the judgment be reversed.

LOVER, STROUSE & CO. *et als.* v. SIMON BESSENGER AND WIFE.

1. BILLS AND NOTES. *Mortgage. Renewal of note secured by.* If a mortgage is given to secure a note, and at the maturity of the note it is renewed, the renewal does not release the mortgage unless such is clearly shown to be the intention of the parties.

2. SAME. *Homestead. Voluntary alienation of.* When a husband and wife execute a conveyance, and the same is acknowledged as required by law, they part with their right of homestead, although the deed may contain no express stipulation conveying the homestead.

FROM KNOX.

Appeal from the Chancery Court. O. P. TEMPLE, Chancellor.

C. E. LUCKY for complainants.

L. A. GRATZ for defendant.

LEA, Special J., delivered the opinion of the court.

On the 28th of March, 1871, defendants, S. Bessenger and wife Sarah, executed a deed of trust on four houses and lots in the city of Knoxville, to secure certain debts due from Simon Bessenger to complainants. Aaron Gaus, a complainant in this cause, was made trustee. The trust was not to be foreclosed until after the expiration of one year from the date thereof. On the 28th of January, 1874, this bill was filed by complainants—the trustee and unpaid creditors secured in the trust deed—to have the same foreclosed. The defendants answered the bill and, among other things not necessary to notice, S. Bessenger insists that since the execution of said trust deed, he has paid the greater portion of the debts secured therein, and the defendant Sarah answers that her signature to the trust deed was obtained from her, in utter ignorance on her part that by such signature she was conveying away from herself and children the right of homestead; that there was nothing in the deed of trust to call her attention to the fact that she was conveying her homestead, and she insists that the deed does not contain sufficient matter to deprive her of a homestead; that the deed on its face must bear clear and distinct evidence of the intention of the wife of the grantor to convey away her right to a homestead, before the deed can have such effect in law.

The property mentioned in the deed of trust was sold by consent of parties, reserving the question of Mrs. Bessenger's right to a homestead fund out of the

proceeds of the sale. A reference was had to the clerk and master to report what sum was due to each of complainants. The report was made, exceptions were by the defendants. Upon the final hearing of the cause, the chancellor overruled the exceptions, confirmed the report and decreed that Mrs. Bessenger was not entitled to homestead; from which decree the defendants have appealed.

The first question presented is upon the exceptions of the defendants to the master's report. Only the first exception is relied upon in the argument here, and is in effect that the clerk, in his report, stated that there was due Jno. B. Ellison & Sons the sum of $926.16; to Gaus, Welgus & Co., $1,558.72; to Arnold, Mesbaum & Midlinger, $1,315.45, when the proof showed that the same was allowed upon notes executed subsequent to the deed of trust. The notes to these parties bear date in March, 1872, twelve months after the date of the deed of trust, but it is admitted by agreement of counsel, which is on file, that these notes were executed for indebtedness secured by the trust deed, and indeed some of the notes on their face recite that they were for indebtedness secured by the trust deed.

It is claimed by the defendants that because these notes bear date one year after the trust deed, they are a novation or payment of the original indebtedness, and the trust deed thereby released to that extent.

The execution of a note in settlement of a previous indebtedness is not a payment unless such was the intention of the parties. Parsons on Bills and Notes,

vol. 2, pp. 150–159; 1 Cranch, 181; 10 Peters, 532. In this case there is no proof of any such intention, and we certainly cannot assume, in the absence of proof, that the creditor would abandon his security of the trust deed and take a note without security in payment of his indebtedness. If a mortgage is given to secure a note, and at the maturity of the note it is renewed, the renewal will not release the mortgage. Mr. Parsons says: "It may be regarded as established, that if a note be secured by a mortgage, and the mortgagor at its maturity give a new note, which is regarded by him and the mortgagee as a renewal of the old note and even repeat this many times, still the original debt is not paid so as to discharge or affect the mortgage, nor will that be discharged unless by payment in money of the first note with interest, or some other payment which the parties agree upon as satisfying the mortgage." Parsons on Bills and Notes, vol. 2., p. 219. If a mortgage be given to secure an indebtedness due by account and afterwards a note is executed for said indebtedness, the mortgage is not satisfied, unless such is clearly shown to be the intention of the debtor and creditor. As before stated, the other exceptions to the report are not insisted upon and are without merit.

The only remaining question in the cause is as to the right of defendant, Sarah Bessenger, to a homestead of $1,000 out of the funds arising from the sale of the trust property. The deed of trust conveys the land therein described to a trustee with power of sale, to satisfy the debts of S. Bessenger to complainants,

and was executed by Bessenger and his wife and acknowledged as required by law. It is insisted that because the word *homestead* is not mentioned in the deed, that the court will not presume that she parted with that right. Our statute is, that a homestead shall exist in the head of a family, "provided that said real estate shall not be alienated without the joint consent of the husband and wife, where that relation exists, to be evidenced by conveyance duly executed, as required by law for married women." This deed is executed in strict compliance with the requirements of the law. And the statute does not require that anything shall be said in the deed about homestead, but only that the conveyance shall be by joint consent. The statute is a sufficient protection for the married woman; she had no other right in the property but homestead, and she could not be mistaken as to what she was conveying, when she signed the deed. We are therefore of opinion that when a husband and wife execute a conveyance and the same is acknowledged as required by law, they part with their right of homestead, although the deed contains no express stipulations conveying the homestead.

The decree of the chancellor is affirmed with costs.

C. F. Waterhouse *et als.* v. The Board of President and Directors of the Cleveland Public Schools.

1. Constitutional Law. *Taxation. Exercise of the power by the Legislature.* The power of taxation belongs to the State in its sovereign capacity. The exercise of the power is legislative. The legislature has no authority to delegate this power except in such cases as the constitution authorizes.

   Cases cited: Marr v. Enloe, 1 Yer., 452; Keesee v. Civil Dis. Board of Ed., 6 Col., 127.

2. Same. *Same. May be delegated for educational purposes to county and municipal corporations.* The legislature has the right under the Constitution, to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively, but can extend the power to no other corporation it might create, although its object be for educational purposes, which the Constitution declares shall be encouraged, because this is a subject upon which that instrument should receive a strict construction.

3. Same. *Same. What will constitute a new corporation.* The corporation styled in this opinion as "The Board of President and Directors of the Cleveland Public Schools," is held to be a new corporation for educational purposes, not contemplated by the Constitution, although its offices are filled by the officers of another corporation, the city of Cleveland, its mayor and aldermen being, *ex officio*, "The Board of President and Directors of Public Schools," etc., and that such new corporation, consequently, has no authority to levy and collect taxes, assessed for school purposes.

FROM BRADLEY.

Appeal from the Chancery Court.

P. B. Mayfield for complainants.

Trewhitt & Sharp for defendants.

McFARLAND, J., delivered the opinion of the court.

The County Court of Bradley county and a corporation styled "The Board of President and Directors of the Cleveland Public Schools," each claim the right to levy a tax for school purposes on the property and polls within the corporate limits of the town of Cleveland. The county court claims the right under an act entitled "An act to reorganize and regulate common schools," approved 8th July, 1870, by which the power is expressly conferred.

By an act passed 28th February, 1870, the inhabitants of Cleveland are incorporated as a body corporate under the name and style of "The Board of President and Directors of the Cleveland Public Schools." One section provides that the mayor and aldermen of the city of Cleveland, (which city had been previously incorporated with the usual powers), shall constitute, *ex officio*, "The Board of President and Directors of Public Schools." Another section enacts that the board of president and directors shall have power to assess, levy and collect taxes on property, polls and privileges within the corporation for school purposes, not to exceed the amount collected by the State, and to be collected as other city taxes. It is under this law that this corporation has also levied a tax for school purposes.

The complainants are owners of shares in a bank at Cleveland. The tax assessed by the county court and by the board of president and directors is the same in amount. The complainants bring the amount

assessed upon their shares of stock into court with their bill, and insist that they are not bound to pay both taxes, and pray that the defendants may interplead and determine to whom it shall be paid.

The power of taxation is one that belongs to the State in its sovereign capacity. The exercise of the power is legislative. The Legislature has no authority to delegate this power of taxation, except in such cases as the constitution authorizes. *Marr* v. *Enloe*, 1 Yer., 452; *Keesee* v. *The Civil District Board of Education*, 5 Col., 127.

The Constitution provides that the General Assembly shall have power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively. But no authority can be found for delegating this power to any other corporation, and this is a subject upon which the Constitution should receive a strict construction. The power of taxation is one of too grave and important a character to be delegated or exercised except strictly within the limits of the Constitution. That the Legislature might delegate this power to any corporation it might create, cannot be maintained, although the object of the corporation be for educational purposes, which our Constitution declares shall be encouraged.

It is argued, however, that the corporate authorities of the city of Cleveland might properly be authorized to levy the tax, education being a corporation purpose within the meaning of the Constitution, and as this act creating the corporation of the Board of

President and Directors of the Cleveland Public Schools provides that the mayor and aldermen of Cleveland shall, *ex officio*, constitute the board of president and directors, etc., and that officers of one corporation shall fill the duties of the other, that it is in reality the same as the corporate authorities of Cleveland and not a new and independent corporation. The act is not susceptible of a very reasonable construction. But we must take it to be, what it professes to be, a new corporation for educational purposes, although its offices are filled by the officers of another corporation.

Whether the levying a tax for school purposes is either a county or corporation purpose, in the sense of the Constitution, is, in the opinion of the writer of this opinion, a subject of serious doubt, since the same purpose thereby becomes at the same time a State, county and corporation purpose, and the right to levy the tax might not only, as in this case, be claimed by the county and corporation, but also by the State. A county or corporation purpose, would more naturally indicate a purpose peculiar to each, some matter exclusively within its control and not subject to the control of the other.

The majority of this court, however, at the last term, held that the authorities of the city of Knoxville might contract to appropriate of its taxes a sum to purchase a library for the University situated near by. This would imply that the establishment of schools is a corporation purpose. I did not, nor do I now concur in that opinion, but a majority of the

court do, and this would settle that the county might be authorized to levy the tax, as the county of Bradley was by the act of 8th July, 1870—it being certainly as much a county as a corporation purpose. In this view we must hold that the tax should be paid to the county tax collector of Bradley county.

This was the decree of the chancellor, and it will be affirmed with costs.

KNOXVILLE, ... SEPTEMBER TERM, 1877.

THOMAS MALONEY, Adm'r, *v.* A. B. WILSON, Adm'r.

STATUTE OF LIMITATION. *Request for delay.* Where a request for delay is made, the party agreeing not to take advantage of the statute of three years for non-resident creditors, he will not be estopped from pleading the statute of six years in defense of the debt.

Case cited: Loyd, Adm'r v. Loyd. This Volume.
Code cited: Sections 2279, 2280–1, 2786.

FROM GREENE.

Appeal from the Circuit Court. E. E. GILLENWATERS, Judge.

J. H. ROBINSON for complainant.

No counsel marked for defendant.

DEADERICK, C. J., delivered the opinion of the court.

This suit was instituted upon an account, by Owens, intestate of Wilson, against Maloney, Adm'r of Robert Johnson, deceased, and before a justice of the peace. Judgment was rendered in favor of defendant Maloney, and the cause was taken by *certiorari* to the circuit court. There judgment was rendered for the plaintiff, Wilson, and defendant has appealed to this court.

The suit was begun on the 4th day of December, 1875, upon two accounts beginning in 1867, and the last item of which is charged February 8th, 1869. The facts were admitted, and the cause decided by the judge without the intervention of a jury, by consent of the parties.

It appears that Robert M. McKee was qualified as administrator of Johnson, on the 7th June, 1869, he having died on the 4th of April, 1869; that the accounts sued on were presented to said McKee on the 8th June, 1872, when he wrote upon the same the following endorsement:

"The within accounts presented to me as administrator of Robert Johnson, deceased, and by my special request suit will not be brought on them for three years from this date, as I have no funds belonging to the estate, with which to pay debts against the same. This endorsement does not waive any defense against said accounts, except the statute of three (3) years, the creditor being a non-resident of the State of Tennessee. ROBERT M. MCKEE,

June 8, 1872. Adm'r, etc., of Robt. Johnson, dec'd."

The circuit judge held that this request suspended also the operation of the statute of limitations of six years, and gave judgment for the plaintiff for the amount of the accounts and interest thereon.

At the November term, 1875, of the county court, McKee resigned as administrator of Johnson, and Thos. Maloney, the plaintiff in error, was appointed and qualified at the same term administrator *de bonis non.*

On the 8th February, 1869, the last charge in the accounts is made. From that date to 4th December, 1875, when the suit was brought, more than six years had expired, and the statute of six years is relied upon in defense of the action.

It will be observed that the request for delay "does not waive any defense against said accounts except the statute of three years, the creditor being a non-resident."

From this stipulation in the request, it is manifest that the defense of the statute of limitations of six years was not waived. The undertaking was that the administrator would not plead the statute of three years, under sec. 2279, Code, estopping himself from this by requesting delay for a definite time under sec. 2280 of the Code.

The statute of six years continued to run, and there is nothing in the request prohibiting the administrator from relying upon it, especially as he expressly reserved, in the request for delay, the right to rely upon every other defense, except the statute of three years.

In the case of *Charles Loyd, adm'r*, v. *Nancy Loyd et al.*, in an unreported opinion by Judge McFarland, it is said, "a request for delay does not prevent the bar of the statute of seven years, Code, secs. 2281—2786, or the statute of six years."

It follows that the accounts were barred by the statute of limitations of six years, and the judgment of the circuit court must be reversed, and judgment will be rendered here in favor of the plaintiff in error.

CHARLES LOYD, Adm'r, *v.* NANCY ANN LOYD, *et al.*

ADMINISTRATORS. *Request for delay. Statute of six years.* A request for delay by an administrator does not prevent the running of the statutes of six and seven years.

Code cited: Sections 2281, 2786.

FROM GREENE.

Appeal from the Chancery Court. H. C. SMITH, Chancellor.

A. W. HOWARD and R. M. MCKEE for complainant.

A. B. WILSON and PETTIBONE & ROBINSON for defendant.

MCFARLAND, J., delivered the opinion of the court.

The decree of the chancellor must be reversed, the demurrer sustained, and the bills dismissed at the complainant's cost.

So far as complainant shows, he has no status in court as the administrator of Erasmus Loyd, to ask a sale of the land descended to pay the debts of the estate, or to question any one's title to the lands. The debts he speaks of, unless it be the judgment, are evidently barred by the statute of limitations, independent of any request for delay he may have made. His request for delay does not prevent the bar of the statute of seven years, Code, secs. 2281, 2786, or the statute of six years; and besides, the bills show that

there were sufficient personal asset to pay these debts, as well as the judgment. The defendant Hankins, claiming the title of the heirs, may make any defense available to them, and the complainant shows no right to maintain this bill. He is not in a position to litigate with Hankins the validity of the tax title—this is a question between him and the heirs.

Decree reversed and bill dismissed.

Bradley County *v.* Surgoine & Tibbs.

County Warrants. *Assignment by delivery. Suit.* For a purchaser of county warrants to maintain suit in his own name, he must be vested with title to same by written endorsement or assignment.

FROM BRADLEY.

Appeal from the Circuit Court. John B. Hoyl, Judge.

J. H. Gaut for plaintiff.

A. J. Trewhitt for defendants,

Nicholson, C. J., delivered the opinion of the court.

Surgoine & Tibbs being the holders by delivery, without written assignment, of a number of county

warrants issued by the chairman of the county court, drawn on the county trustee and payable to various individuals or their orders. These warrants or orders were transferred by delivery to Surgoine & Tibbs, who sued the county thereon in their own name, setting out the orders as the foundation of the suit and making profert thereof. To this declaration the county demurred—assigning, among causes of demurrer, that the declaration does not aver or show any legal liability of the defendant to the plaintiffs. The demurrer was overruled, and upon a trial the plaintiffs had judgment, from which defendant appealed.

The orders are drawn by the chairman of the court upon the trustee of the county, payable to J. H. Galbreath and various others; the orders are passed to Surgoine & Tibbs by delivery only, and they sue in their own names. No legal title passed by the delivery of the orders without written assignment. The demurrer reached this defect in the title of plaintiffs, and ought to have been sustained. There is no count in the declaration except that based on the warrants or orders. To maintain their suit the plaintiffs should have shown themselves vested with the legal title to the orders by endorsement or assignment of the payees thereof.

For this error the judgment is reversed and the cause remanded.

NATHAN W. BACHMAN v. MARTIN ROLLER.

BILLS AND NOTES. *Parol testimony. Statute of limitations. New promise to third party. Sufficient when.* The words, "Par Bank Notes," have a fixed signification in commercial parlance, which cannot be varied by parol testimony. Under a replication of a new promise to pay a debt barred by the statute of limitations, evidence of admissions or promises made to a stranger, is only admissible when it appears the debtor intended they should be communicated to the creditor.

FROM WASHINGTON.

Appeal from the Circuit Court. J. A. MCKINNEY, Judge.

INGERSOLL & ROBINSON for complainant.

HAYNES & VANCE for defendant.

SNEED, J., delivered the opinion of the court.

The action was upon a promissory note, executed 31st of January, 1860, by the defendant to the plaintiff, and due at one day, for two thousand seven hundred and ninety-one dollars and seventy-three cents, payable in "par bank notes." Underneath the note was written a memorandum by the holder in these words and without signature, "Samuel Bachman is bound in writing to pay the above in gold and silver. See obligation."

The suit was instituted on the 1st of April, 1872,

and two verdicts have been had for the plaintiff. Among the pleas originally filed were those of a tender and the statute of limitations of six years; but the former plea was abandoned and withdrawn, as appears of record, and the defense was rested on the statute of limitations, to which the plaintiff had filed the replication of a new promise, which issue was found in favor of the plaintiff, and judgment rendered accordingly.

In the view we take of the case, it is scarcely necessary to elaborate the discussion of all the questions presented in the argument. It was proposed on the part of the defendant to explain the memorandum written under the note, with a view to show that another party was bound for its payment. This, under the objections of the plaintiff, was very properly excluded. There was no plea in the files that justifies such an inquiry, nor upon the face of the paper or otherwise does it appear that the defendant's liability was in any degree dependent upon any collateral arrangement between the plaintiff and any third person. The defendant also, over the objections of the plaintiff, proposed to prove the meaning of the words, "par bank notes," as they were to be understood by the parties under a contemporaneous agreement between them. This testimony was also, as we think, very properly excluded. The words par bank notes have a distinctive technical meaning, and they must speak for themselves. They are, in commercial and financial parlance, used to denote a state of equality or equal value; an equality of actual with nominal value;

and being terms well understood in the law, it was the province of the court, if necessary, to explain their meaning to the jury, and not for the parties to do so unless they had, by the writing given to them, a different interpretation from that commonly accepted in the usages of commerce and trade. According to the written contract the note was to be paid by the then standard of value according to its nominal value in dollars, and the written terms of the contract could not be varied, altered or changed by any outside parol understanding between the parties. The court declined, upon request, to state to the jury that the defense of the statute of limitations was an honest and reputable one. We cannot see upon what principle such instructions could be demanded. All that the court was required to do was to instruct the jury that it was, if made out, a valid, complete and lawful defense to the action. With the moral aspect of the plea the court had nothing to do, and any instruction or statement of the private opinion of the judge as to its morality, would have been an irrelevant abstraction. These immaterial matters out of the way, we come to consider the main point of contention in argument here as in the court below; and that is, whether the plaintiff has made good his replication of a new promise by proof of such an acknowledgment of the debt as a subsisting obligation, and such a promise to pay, express or implied, as will obviate the bar of the statute. It is insisted on the part of defendant that if any such acknowledgment and new promise is established by the proof at all, it is upon

the testimony of third persons to whom the same was made, and not to the plaintiff or his agent. And there is much force and plausibility in the argument of the defendant's counsel, that if the theory of our adjudged cases be true, that such an acknowledgment, if it is to operate at all, must have the effect of creating a new contract founded on the old consideration; that such a contract must be a bilateral agreement between the parties themselves, and not between the defendant and a stranger. In accordance with this view the defendant's counsel requested the court to exclude all promises or acknowledgments made by the defendant to any other person than to the plaintiff himself or his attorney. This was refused, and promises and acknowledgments to divers persons other than the plaintiff or his agent were permitted to go to the jury. The effect of all our adjudged cases upon this subject is, that there must be an express promise to pay or an admission of an existing debt, which the debtor is willing to pay. *Hunter* v. *Starkes*, 8 Hum., 656; *Belot* v. *Wynne*, 7 Yer., 534; *Broddie* v. *Johnson*, 1 Sneed, 464; *Butler* v. *Winter*, 2 Swan, 91. But we are not aware that the precise question whether such a promise or acknowledgment to a stranger would answer the requirements of the law, has ever been directly adjudged from this bench. It does appear, however, that the question was incidentally adjudged in favor of the plaintiff's view in the case of *Thompson* v. *French*, 10 Yer., 457, where the testimony of a stranger to the record, having no agency or other privity with the plaintiff so far as the case discloses,

was permitted to testify as to a conversation with the defendant as to a promise and acknowledgment of a subsisting liability, which the court held conclusive of the case. Whether or not the question was presented and contested upon a like agreement as in this case, we are not advised. It was broadly held in many of the earlier cases on the subject, that such an acknowledgment was good whether made to a third person or to the plaintiff in the action. 5 Harrington, 380; 1 Ala., 225; 9 Wend., 897; 16 Wend., 477; 4 Wooster, 319; 21 Barb., 351; 4 Barb., 163; 6 Barb., 585; 4 Pick., 100; 16 Verm., 193; 1 Harris & Gill, 204; 7 Geo., 505; 4 Potter, 225. But many other cases qualify the doctrine so as to make the sufficiency of the promise depend upon the fact whether the intention appears that the declaration to the stranger should be communicated to the creditor. *Wakeman* v. *Sherman*, 5 Selden, 85; 2 Story Eq., sec. 1521; *Collett* v. *Frayzer*, 3 Jones' Eq., 89; 26 Ala., 433. In the case of *Collett* v. *Frayzer*, it was held by the Supreme Court of North Carolina, that where a person, on his death-bed, said to a bystander that he owed a certain sum, which he named, as a balance for certain slaves which he had bought, and that he wished it paid, it was held a sufficient acknowledgment of the debt to take it out of the statute of limitations. 3 Jones' Eq., 80; 3 Batt. Dig., 420. This is consistent with the more modern rulings on the subject, as it was manifest that the debtor in that case wished and intended *the* declaration thus made *in extremis*, for the benefit of the creditor and to be communicated

to him. And it is said in the learned note to the case of *Whitcomb* v. *Whiting*, 1 Smith's Lead. Cas., 889, after an exhaustive review of all the authorities, that most of the cases in which an admission to one man has been held to take the case out of the statute in favor of another, will be found to rest on this ground, or on that of the existence of such a privity between the person to whom the declaration was addressed and the creditor, that what was said to the former, might fairly be presumed to have been meant to reach the ears and influence the course of the latter. *Mountstephen* v. *Brooke*, 3 B. & Ald., 141; *Clark* v. *Hougham*, 2 B. & G., 149; *Bloodgood* v. *Bruen*, 4 Selden, 362; *Evans* v. *Carey*, 29 Ala., 99.

We hold that this latter doctrine is the sounder and safer of the two, upon the principle that the new promise, after the remedy is barred, creates a new contract; and if it *is* a new contract, it follows as a logical sequence that it must be made between the parties in interest, and not between the defendant debtor and an utter stranger. The charge of the court on this point, and the admission of the testimony referred to, was erroneous.

Let the judgment be reversed and a new trial be awarded.

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LEVISAY *v.* DELP *et al.*

1. FERRY LICENSE. *Injunction. Chancery Court. Has no power to protect parties possessing statute privileges and franchises. When. Statement:* The banks of the river are owned by different persons, both run a ferry and have the same landing, one with, the other without, a license. *Held*, land may be appropriated to the use of a public ferry as an easement for the benefit of the public, but a person who runs a ferry, under a license, has no such rights against third persons, who set up an opposition without license, as a court of equity can protect by injunction or otherwise.

   Case cited. Corporation of Memphis *v.* John Overton *et als.*, 3 Yer., 390.
   Code cited: Sections 1241, 1242 and 1248.

2. SAME. *Evidence. Records of County Court are. When.* In courts of equity the records of the county court, when duly certified to and regularly filed as evidence, become such as much as a deposition or any other testimony.

FROM HANCOCK.

Appeal from the Chancery Court. H. C. SMITH, Chancellor.

JARVIS & DAVIS for complainant.

T. M. FULKERSON for defendants.

FREEMAN, J., delivered the opinion of the court.

This bill was filed to enjoin defendants from carrying on a ferry on Clinch river, to the injury of complainant's ferry, which was licensed by the county court of Hancock county in 1873, and had been kept up by him from that time.

The proof shows complainant owns an undivided interest in the land on the north side of the river. Defendants, in January, 1876, had bought a small portion of the land including the landing, on the south side, and soon after commenced to run their ferry boat, both parties using the same landings. It will be seen, that this is not a contest between two rival claimants for a license to establish a ferry, as in most of the cases reported in our books. Complainant has his license, and by virtue of it enjoys the ferry franchise. His complaint is, that another party is engaged in running a ferry boat at the same place from the opposite side of the river, and his contention is, that the court shall stop this by injunction.

We do not say that there may not be cases where a court of chancery would intervene to protect the rights of a party, for an "injunction may be granted," says Mr. Story, (Eq. Jur., vol. 2, Perry Ed., sec. 927), "in favor of parties possessing a statute privilege or franchise, to secure the enjoyment of it from invasion by other parties. The right would have to be clear and exclusive in such cases, and in England, established, if disputed, by a verdict, before a perpetual injunction would be decreed."

In our State, the ferry franchise is deemed one of public interest, standing on the same footing as a public road, and the land of a party may on this principle be appropriated to the use of a public ferry, as an assessment for the use of the public. See 3 Yer., 390.

The county court, by sec. 4206 of the Code, is given the general supervision over roads and ferries,

to establish and regulate the same. By sec. 1241, the *owner* of both banks of the river is entitled to have a ferry upon application to the county court. By sec. 1242, where the banks are owned by different persons, each owner is entitled to keep a ferry; and each is entitled to transport persons across the river and land them on the opposite bank, by the next section of the Code. The county court must authorize the ferry in each case, however, and is required to take a bond for faithful performance of the duties imposed by law. See sec. 1248.

The result of this is, that while complainant is entitled under his license, while it is unrevoked, to run his ferry, as against the other party he has no exclusive rights which a court of equity ought to enforce, any more than a licensed merchant would have as against an unlicensed dealer, who might sit down and commence business by his side. The latter would violate the law by thus engaging in the business without license, but would not be answerable to the other party for such violation in a court of chancery. It would be an idle exercise of the injunctive power by the court to restrain him in this case, when as owner of one bank of the river, he may apply to the county court and obtain a license or order establishing his ferry, thus legalizing it, at next term of that court.

It is perhaps proper to refer to the question made by counsel, that the record of the county court is not evidence in this case, because not made so by bill of exceptions. The cases referred to by counsel have

no bearing on this case—they were at law. In this, the record duly certified, was regularly filed as evidence in the case, and became evidence, as much as a deposition or any other testimony.

On the whole case, the chancellor's decree dismissing the bill is correct, and we affirm it with costs.

WM. H. RAMBO *v.* R. A. DONELLY *et al.*

REDEMPTION OF REAL ESTATE. *Partial payments.* The purchaser may receive partial payments or demand the full amount. In the absence of any other agreement, partial payments must be understood, with reference to the redemption laws, and by the favor of the purchaser. If at the end of two years the whole amount be not paid, the purchaser becomes debtor to the original owner to the extent of the amount paid, which may be recovered either in chancery or by an action at law.

FROM JOHNSON.

Appeal from the Chancery Court. H. C. SMITH, Chancellor.

FOLSOM for complainant.

BUTLER & DONELLY for defendants.

TURNEY, J., delivered the opinion of the court.

By sections 2124 and 2126 of Code, "Real estate

sold for debt shall be redeemable at any time within two years after such sale." "Any debtor whose interest in real estate has been so sold and is subject to redemption, may redeem said interest by paying to the purchaser or to any one claiming under him, the amount so bid or paid by him, with interest thereon at the rate of six per cent. per annum, together with all other lawful charges."

Under this statute the purchaser may demand the full amount in one payment and refuse partial payments, yet under the statute he may receive partial payments from time to time, and if by such partial payments made within the time prescribed he shall receive the full amount with interest and other lawful charges, the redemption is complete.

In the absence of agreement to the contrary, a partial payment on the amount necessary to redeem must be understood to be made with reference to and in pursuance of the redemption laws and by the favor of the creditor or purchaser.

The indulgence by the purchaser and his relaxation of the rigor of the law cannot be construed a waiver of his title acquired by the purchase, and its conversion into a mortgage. If after partial but without full payment the two years expire, the purchaser or those claiming under him become debtor, to the extent of the payments, to him whose land has been sold, which may be recovered in an action at law, or proper proceedings in chancery.

Reverse the decree with costs and enter proper decree here.

Wm. Ross, in error, v. Thos. C. Crow.

Revenue Laws. *Construction of acts. Sale before payment of tax on whiskey, void only when made with intent to defraud the revenue. Contracts contrary to acts of Congress.* A sale of brandy before payment of the tax imposed by the revenue laws, is not void unless made with intent to avoid the payment of the revenue.

Cases cited: McGavock v. Puryear, 9 Hein., 461; Yerger v. Rainie, 4 Hum., 259.

FROM GREENE.

Appeal from the Circuit Court. E. E. Gillenwaters, Judge.

Ingersoll & Wilson for plaintiff.

Pettibone & Robinson for defendant.

McFarland, J., delivered the opinion of the court.

Crow brought this action, averring in his declaration that in December, 1866, he sold the defendant Ross three hundred gallons of brandy, for which Ross was to pay him $1.25 per gallon, and also to pay the United States revenue tax of $2.00 per gallon; that the $1.25 per gallon was paid, but the defendant failed to pay the United States revenue tax, and the plaintiff was compelled to pay it himself, and brings this action to recover the amount.

The defense principally relied upon is, that the

contract was absolutely void, being in contravention of the United States statutes against the sale or removal of distilled spirits, before the payment of taxes. We are referred to two acts of Congress, one approved 30th June, 1864, the other the 13th July, 1866, as embodying the law in force at the time this contract was made. The 48th section of the first named act provides that goods upon which duties are imposed, found in the possession of any one for the purpose of being removed in fraud of the revenue laws, or with design to avoid the payment of said duties, may be seized and declared forfeited to the United States, and the offender is subjected to fine and imprisonment. The 180th section of the same act provides that if any person liable to pay such tax shall sell the article before the tax is paid, with intent to avoid the tax, the debt contracted on the sale shall be void and not enforceable in any court, unless the security given be in the hand of an innocent holder. Thus stood the law under this act, and by its express terms such sales are void and the debt not collectable in the hands of the vendors, if the sale was made *with the intent to avoid the tax.*

By the 45th section of the act of 1866, it is enacted "that any person who shall remove any distilled spirits otherwise than into a bonded warehouse, as provided by law, shall be liable to a fine, etc., and imprisonment; and any spirits so removed, and all distilled spirits found elsewhere than in a bonded warehouse, not having been removed according to law, and the taxes not having been paid, shall be forfeited

to the United States, or may be seized upon discovery and sold for taxes and expenses." This act is silent as to the effect of sales in contravention of this section. The argument for the plaintiff Crow is, that at most, sales can only be declared void when the sale or removal was made *with intent to avoid the tax*, as declared by the 180th section of the first named act. This was certainly so under the first act. Only removal, *with intent to avoid the tax*, was prohibited, and only with intent to avoid the tax are declared void. But the act of 1866 makes unlawful the removal of distilled spirits, except to a bonded warehouse, *without regard to the intent*, but says nothing as to whether a contract made in contravention of the prohibition may or may not be enforced. A legislative act may prohibit the doing of a particular thing and make it unlawful, subjecting the offender to penalties, yet the act may not intend to render void contracts made in contravention thereof. Whether such be the intent is to be gathered from the entire act, and the intent of the law-making power, when ascertained, must control. When an act prohibiting a particular thing being done is silent as to the effect of a contract made in contravention thereof, and there be nothing in the act from which a contrary intent can be drawn, the contract will be held void. Such is the reasoning of Justice Swayne, in *Harris* v. *Runnells*, 12 Howard. That case was upon the question whether the price of a slave, carried into the State of *Mississippi* and sold in violation of the statutes of that State, could be recovered. The court held that it

might be; that it was the intention of the act to prohibit the importation and sale except under certain regulations, but it was not the purpose to render void all contracts of sale. The result was reached upon a consideration of the particular terms and objects of the statutes of *Mississippi*. The case is authority only for general principles announced.

It will be observed that in the act of 1866, there is nothing prohibiting a sale of distilled spirits. It is the removal that is prohibited, and a sale might doubtless be made which would be lawful under both acts; that is, if the sale was not with the intent to avoid the tax, it would not be void under the terms of the first act. If the sale should not contemplate a removal in violation of the second act, it would not come under the prohibition of this latter act. The act of 1866 repeals all laws inconsistent with its provisions. The 48th and 180th sections of the act of 1864 are not inconsistent with the act of 1866, so that these sections were still in force, and from this it would result that a sale of spirits before the payment of taxes, *with intent to avoid the tax*, was void and could not be enforced in any court, by the express provisions of the 180th section of the act of 1864, *whether the sale contemplated a removal of the spirits before paying the taxes or not.* But the act of 1866 prohibits a removal of the spirits, except in the prescribed mode, and annexes severe penalties *without regard to whether the removal was with a fraudulent intent or not.* Now while this does not prohibit a sale, yet the question is, whether a contract of sale which stip-

ulates as a part of its terms for an unlawful removal is valid or capable of being enforced? The plaintiff's testimony tended to show that it was a part of the stipulations of the sale that he was to deliver the brandy at Kingsport, in Sullivan county, it having been distilled in Carter county, and that it was not expected that the defendant was to pay the taxes until the delivery. This stipulation for a delivery at Kingsport involved a removal, and it was for the jury to say whether this was a removal other than to a bonded warehouse, as specified by the act. Is a sale, then, which stipulates as part of its terms that the spirits are to be removed, in violation of the act of 1866, void?

The general rule, as stated by Justice Swayne, in *Harris* v. *Runnells*, before referred to, is, "contracts in violation of statutes are void, and they are so, whether the consideration to be performed or the act to be done be a violation of the statute." So this court held in *McGavock* v. *Puryear*, 9 Heis., 461, that a loan of money was not so illegal as to prevent the collection of the note given therefor, merely because the creditor knew of a purpose upon the part of the borrower to use the money for an illegal object, but that it would be otherwise if the consideration stipulated *for* was an agreement to do an illegal act. Here the contract sued upon is the promise of the defendant to pay the sum of money sued for. Assuming that the consideration of this promise was the agreement of the plaintiff to remove three hundred gallons of brandy, in violation of the act of Congress,

and deliver it to the defendant, and that this was done, it makes a case where the consideration to be performed is in violation of a positive statute, an agreement to do what is positively forbidden under severe penalties, and this under the general rule makes the contract void. But it is argued that as the act of 1866 is silent as to what contracts shall be void, that only those shall be void, declared so by the 180th section of the act of 1864—that is, sales with intent to avoid the tax. If this section were a part of the act of 1866, the argument would probably be conclusive; but the act of 1866 makes unlawful, acts that were not unlawful under the act of 1864, and being silent as to the effect of contracts made in contravention of it, the general rule laid down in the case of *Harris* v. *Runnells*, which case is cited and relied upon by plaintiff's counsel is, that the contract is void, unless we can see from the entire act, or the nature of the act prohibited, that it was not the purpose of Congress that the sale should be void. There is an apparent injustice in allowing the party who has received the consideration to avoid the payment, upon the ground of the illegality; thus, while it is punishing one party severely, it is apparently offering a premium to the other; and for this reason and to avoid this result, courts have often made exceptions to the rule—many of them upon perhaps unsubstantial ground. We can see no substantial ground for an exception in this case; further refinements, we think, would but tend to break down the rule altogether, and this we are hardly prepared to do. The general rule

has been recognized in this State, that a contract in violation of a positive statute is void. See *Yerger* v. *Rainie*, 4 Hum., 259.

We held, in a recent case at Jackson, that a contract between a citizen of a loyal State and a subject of one of the Confederate States during the late war, by which the former paid to the latter a large sum of money, $100,000, in purchase of cotton, was absolutely illegal, although the cotton was not to be delivered until after the close of the war, and that the money paid could not be recovered back, as the payment of the money from the one to the other was in direct violation of the acts of Congress, and to the laws and usages of these as to non intercourse.

We hold, therefore, that the circuit judge should have instructed the jury, that if the sale in this case was before the tax was paid, and with intent to avoid the tax, then the sale was void, whether an unlawful removal was contemplated or not, and the plaintiff could not recover; and further, if the defendant's promise to pay was in consideration of the plaintiff's agreement to remove the spirits elsewhere than into a bonded warehouse, and there deliver the same to defendant, the contract would be illegal without regard to the intent of the removal. The judge said to the jury, as "the sale is not void under the revenue laws because made before the payment of the tax," further instructions were asked and refused.

The judgment must be reversed.

We have considered this case upon a petition to re-hear. It is argued that the removal of the brandy in this case, if it was unlawful at all, was an unlawful removal *out of or from* a bonded warehouse. This was forbidden by the act of 1864. The act of 1866 was intended to compel the distillers to remove their distilled spirits from the still *into* the bonded warehouse, and therefore forbid under a severe penalty a removal from the place where distilled, elsewhere than into a bonded warehouse. The manner in which it could be lawfully removed *out of* the bonded warehouse, was provided for in the previous act of 1864. It is insisted in this case that the brandy had been removed from the distillery into the plaintiff's private bonded warehouse as provided by law, there being no public bonded warehouse; that the distiller might provide a place or warehouse to deposit his spirits, and upon notifying the proper revenue officer and giving bond and obtaining license, the spirits would then be in the bonded warehouse as required by law, and in the custody of the revenue officer; and that all this was done in this case, and if the removal was unlawful, it was because in violation of the act of 1864, as to the manner of removal from a bonded warehouse. We did not express any opinion upon these disputed questions of fact. But upon such a state of facts, it would seem to follow that as the law violated was the act of 1864, only such contracts should be declared void as are declared void by that act; and upon further consideration, we have determined to modify the foregoing opinion to the extent

of holding that contracts of sale shall be held void, only when they come within the purview of the 180th section of the act of 1864; that is, when made before the payment of the tax, with the intent to avoid the tax. We may arrive at this conclusion by construing the acts of 1864 and 1866 as parts of the same acts, and as such contracts are in terms declared void by the act of 1864 and no other, we may fairly conclude that it was not intended that any other violations of the acts should avoid contracts made in contravention thereof; but still the judgment in this case must be reversed. Although the special instructions asked were not proper, yet it was error for the court to say to the jury that the sale was not void under the revenue law because made before payment of taxes, without more. The charge should have been, that the sale was not void unless made with intent to avoid the payment of the taxes.

The judgment of reversal heretofore entered will stand.

L. TILLMAN, JR., Adm'r, v. CALLIE B. COCKE *et al.*

1. ADMINISTRATORS AND EXECUTORS. *Evidence. Code, sec. 3813d. Allowing a party called by the court to testify. Unconstitutional.* Section 3813d of the Code, allowing a party, in suits by or against executors, etc., called by the court, to testify, is unconstitutional and void.

2. STATUTES. *Construction of.* Where the latter clause in a section of an act is distinct and separable from the first, it will not render the whole section invalid necessarily, for the one to be declared void.

FROM KNOX.

Appeal from the Chancery Court. O. P. TEMPLE, Chancellor.

JAS. COMFORT for complainant.

T. R. CORNICK for defendant.

FREEMAN, J., delivered the opinion of the court.

The original bill in this case was filed to settle the estate of the late James R. Cocke. Pickle filed his petition as a creditor and became party, and filed a claim as a creditor of the estate.

We need not at present go into the particulars of this claim further than to say, that it is to be proven and made out solely on the evidence of the claimant himself. He states the fact in his petition, sworn to, and asks an order from the chancellor that he be allowed to be examined as a witness, he being the

only party cognizant of the facts, the transaction being one exclusively between Cocke and himself, having some elements of confidence in it, as between them.

The chancellor made an order allowing him to testify. The question presented for our consideration is, was this order proper, and the testimony properly permitted in the case?

The section of the Code under which the right to testify in this case is claimed, is section 3813*d*, in connection with the previous section. The latter section allows all parties to testify, relieving them from incompetency in all civil courts of this State, notwithstanding they may be parties to the suit or interested in the issue tried. This is the general rule. The other section, however, enacts certain exceptions. "In actions or proceedings by or against executors, administrators or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to *testify* thereto by the court."

It is evident that under this last clause, it was intended by the Legislature to give the court the power to call the party, or require of him to testify, and that unless so required he should be incompetent under the previous part of the section quoted. Can this be sustained as a law of the land, or does it not confer on our courts legislative, and not judicial power?

We have given some consideration to this question, and we are compelled to hold the latter to be the

result. The rule of law, the general rule which is the law of the land, applicable to all the parties named, is, that they are incompetent. Such would be the rule to be enforced by the court on objection made to such a witness, and by which he would be adjudged incompetent under the law to testify. This, then, would be the rule of law; but under this last clause the court might say, the law renders you as a party incompetent, and you cannot be permitted to sustain your right as claimed, by your own testimony; it must therefore fail. But I think this is a proper case, where you may be required to testify, and the court has the right to relieve from the disability imposed by the law; you can therefore be a witness, because the court thinks it a proper case to allow this to be done.

This is to leave the rights of parties dependent on the will of the judge, with no rule prescribed by which he is to be guided in his action—nothing by which the party can say, it is his right to be heard. In a word, in the place of a rule of action prescribed being made the test of the right of the party, the court makes the rule and enforces it, or refuses to make it, as he chooses; thus performing a legislative act, that is, giving the law to the party in the particular case, not deciding upon what that law is. The practical result is, or may be, that a debt may be recovered, as in this case, if the court chooses to allow the party to prove it; but if not, the right claimed cannot be maintained. This would leave no rule for the action of all the courts of the State by which to

be guided, nor the same court in every case, but would make the law on which the rights of the parties depend, as variable as the judgment, whim, caprice, or even prejudice of the judge might dictate. This is not to adjudge what the law is, but to make it, a power which cannot be conferred by the Legislature upon the judiciary. It belongs to the law-making department to say what shall be the rule by which the rights of parties are to be settled. It is the judicial function to ascertain what that rule is, and enforce it, or apply it to the decision of questions presented. No rule is prescribed in this statute, except the will of the judge.

Since writing the preceding, we have had other arguments presented, one point being made, which we deem it proper to notice. It is substantially, that the whole section containing the exception must stand or fall together, not being separable. We do not think this is such a case. The clause giving the discretion is distinct from the other, and may well be held void, and the other exceptions stand, as the general rule, as was intended by the Legislature.

We think, therefore, Pickle was incompetent under the general rule, and discretion given to allow him to testify is not warranted by the constitution, and could not be exercised by the court.

A decree will be entered to this effect with costs.

J. B. NORRIS *v.* J. H. STEPHENS.

MINOR. *County court may bind, when. Child not to be bound without mother's consent, when.* An order of the county court binding a minor to involuntary servitude, is not conclusive upon him or the mother, when made upon the court's own motion, without notice to either the minor or the mother, and the court having determined the existence of none of the facts necessary to make their action proper in such cases

The court say: "The failure of the mother, upon being subsequently informed of the order of the court, to take action to repudiate the binding, would not necessarily render the action of the court valid, especially as against the minor himself, upon the supposition that he had been abandoned by the mother. If the mother be able to support the child, it cannot be bound without her assent in open court. If the mother be not able, or if she has abandoned him, yet if the child is able to support and take care of himself by his own labor, we think the court has no power to bind him, without he is in some way a party to the proceeding so as to bind or estop him, which we think does not appear in this case."

Case cited: Lawson v. Scott, 1 Yer., 92.

Code cited: Secs. 1622, 2547–9.

FROM WASHINGTON.

Appeal from the Circuit Court. J. A. MCKINNEY, Judge.

J. E. REEVES for complainant.

J. H. KIRKPATRICK and E. N. GRIFFITH for defendant.

MCFARLAND, J., delivered the opinion of the court.

Norris brought this action to recover of Stephens for services rendered him as a laborer upon his farm.

The defense was, that the plaintiff, at the time the services were rendered, was a minor, and was regularly bound to the defendant by the order of the county court of Washington county. The defense was successful. A new trial being refused, the plaintiff has appealed in error.

The question is, was the plaintiff legally bound or apprenticed to the defendant by the order of the county court.

The plaintiff's father died during the late war, leaving a widow and five children, of whom the plaintiff was the oldest. The proof indicates that the widow was without property, but supported her family by her labor, with the assistance of the plaintiff, who was hired to the defendant for one or two years previous to September, 1870, at seven or eight dollars per month. About September, 1870, there was some misunderstanding between the plaintiff and his mother, the nature and extent of which is left somewhat uncertain. It is claimed, for the defendant, that the plaintiff was abandoned and driven from home by his mother; but this is denied. On the 5th of September, 1870, the county court made the following order: "On motion, the court bound Isaac Norris to John H. Stephens, with him to live and work as an apprentice, and the said John H. Stephens came into open court and executed a bond, with Vincent Boring as security, which bond is on file in the clerk's office." A bond was executed in substantially the usual form, but was not recorded as required. The age of the plaintiff at the time is somewhat uncertain. Accord-

ing to the recitals of the bond, he was fifteen years of age in June previous, and there is other testimony tending to show that this was his age, but, according to the testimony of the plaintiff, he was then seventeen years of age. It appears that the plaintiff knew of this proceeding, and there is some evidence tending to show that it was according to his desire, but he was not in any legal sense a party to the proceeding. His mother had no notice of the proceeding, and did not assent to it. The plaintiff remained with defendant some two years and ten months, when he left, and, on arriving at age, brought this action.

The question is, whether the binding was legal and gave the defendant the right to the plaintiff's services accordingly. By the Code, sec. 2547, "where the estate of an orphan is of so small value that no person will educate him or her for the profits thereof, such orphan shall, by direction of the court, be apprenticed. . . ." And by sec. 1622: "The county court may bind out as apprentices suitable orphan children of any person unable to provide for their support. . . ." Both of these sections are taken from the act of 1762, ch. 5, sec. 2549. Sec. 2549, from the act of 1825, ch. 46, sec. 1, enacts that "any child totally abandoned by the father, and for whom he fails to provide support and maintenance, may be bound out by the county court as though the father was dead. But no child shall be bound out unless the assent of the mother is first given in open court, or she be unable to provide for his maintenance." It is argued that the provision in the above section,

in regard to the assent of the mother, only applies to these cases referred to in the section where the father is living but has abandoned the child, and not to cases where the father is dead; but we see no ground for the distinction. If the father is living, but has abandoned the child, the child may be bound out *as if the father were dead*. But in either case, if the mother be living and able to support the child, it shall not be bound out without her assent in open court, unless an exception exist as to illegitimate children, as to which see *Lawson* v. *Scott*, 1 Yer., 92, and sec. 1625 of the Code.

If the mother be not able to support the child it may be bound out, notwithstanding she refuses to assent. But, in such case, ought the mother to have notice of the proceeding? This would seem reasonable, although we find no provision requiring notice to her. We are not disposed to adopt rulings calculated to embarrass the action of the county court on this subject. Their jurisdiction is general and unquestioned, and if that court determines that the person is a minor orphan, without estate and a pauper, and unable to procure his or her own support; that the mother is unable to maintain the child, or has abandoned it, and it is a suitable person to be bound out, we would hesitate to declare the order or judgment void where, as in this case, it is brought collaterally in question. But the question is, whether or not it should appear from the record that the court adjudged or determined the existence of these facts. We hold that where it appears, as in this

case, that the mother was living and had no notice of the proceeding, and gave no assent, and the minor was not a party, and the order or judgment of the court does not find or assume the existence of any of the facts authorizing the action of the court—that is to say, does not find or assume that the person to be apprenticed is a minor without means of support, either by himself or the assistance of his parent, is a suitable person to be apprenticed—that the order of the court is not valid or binding. The plaintiff in this case, although young, is shown to have been able-bodied and active, entirely able not only to support himself by his own labor, but also to assist his mother in supporting the balance of the family. In such a case we are not prepared to hold that an order of the county court binding the minor to involuntary servitude, conclusive upon him or the mother, when made upon motion, without notice to either the minor or the mother, and without opportunity to them to contest the matter or appeal, and without the court determining the existence of any of the facts making their action proper. The circuit judge instructed the jury, that if the mother had driven the plaintiff from home, and shown no dissent from the action of the county court, then the action of the court would be legal and binding. This we think is erroneous. The failure of the mother, upon being subsequently informed of the order of the court, to take action to repudiate the binding, would not necessarily render the action of the court valid, especially as against the minor himself, upon the supposition that he had been abandoned

by the mother. If the mother be able to support the child, it cannot be bound without her assent in open court. If the mother be not able, or if she has abandoned him, yet if the child is able to support and take care of himself by his own labor, we think the court has no power to bind him, without he is in some way a party to the proceeding, so as to bind or estop him, which we think does not appear in this case.

The judgment will be reversed and a new trial awarded.

W. B. Wall *et al.* v. Delilah Marsh *et al.*

Bills and Notes. *Condition. Default. Whole sum due. Waiver. Maker's rights.* A stipulation in a promissory note, bearing interest payable annually, that upon a failure to pay interest annually the note shall be due, is a provision for the benefit of the payee, which he may waive, and cannot be taken advantage of by the maker of the note.

Case cited: Carruthers v. McBurney, 3 Sneed, 590.

FROM GREENE.

Appeal from the Chancery Court. H. C. Smith, Chancellor.

E. C. REEVES and W. MCSEEN for complainant.

ROBT. M. MCKEE for defendant.

MCFARLAND, J., delivered the opinion of the court.

The question in this case is the proper construction of the following obligation, to-wit:

"Eight years after date, with interest from date, to be paid annually, I promise to pay Delilah Marsh five hundred dollars for value received June 10, 1862. It is understood, if I fail to pay the interest annually on above sum, that it is all to be due from that date, that is, the date of my failure, and the said Delilah Marsh, or her representative, may proceed to collect the principal and interest remaining on said debt after such failure. Witness my hand and seal. The above to be in current bank notes.

"(Signed) Wm. B. Hudson. [L. S.]"

The interest was not paid annually, the only payment being credits upon the note, to-wit: $20, April 17, 1866; $65, January 22, 1867; $20, December 5, 1868. Hudson executed a deed of trust upon certain lands to secure the debt, the deed in substance following the terms of the above obligation. No steps were taken to enforce the collection of the money until after the expiration of more than eight years from the date of the note, to-wit, in 1875, when the trustee was proceeding to sell the land in accordance with the power in the deed, when the heirs of Hudson (he having died) filed the original bill, insisting that by the terms of the note it fell due at the

expiration of the first year, June 10, 1863, by reason of the interest not being then paid, and the note should be scaled to the value of current bank notes at that date. On the 10th of June, 1863, current bank notes were greatly depreciated; but upon the expiration of eight years from the date of the note, which would be the 10th of June, 1870, bank notes answering this description were not so greatly depreciated; so that it is the obligor in the note, or his representative, that now insists that by reason of his failure to pay the interest as stipulated, the entire note fell due at the expiration of the first year, and that the amount now due is the value of current bank notes at that date with interest; and so the chancellor held, and from this decree the representative of Mrs. Marsh has appealed.

We think the decree is erroneous. We hold that the condition annexed to the obligation, that the failure to pay the interest annually should cause the entire amount to fall due and give the payee the right then to proceed to collect the entire amount, was a stipulation for the benefit of the payee, Mrs. Marsh, in the nature of a penalty to enforce the prompt payment of the annual installments of interest—a stipulation that Mrs. Marsh might have enforced, but which she might waive. This was not a stipulation for the benefit of the obligor, Hudson. He had no right at the expiration of the first year to pay the whole amount of principal and interest on the note, and had he tendered it in proper funds Mrs. Marsh would not have been bound to receive it. Such was not the

contract. She would only have been bound to receive the interest. But if Hudson had the option, for his own benefit, to make the whole debt then due and payable by failing to pay the interest, he would thus be receiving the benefit of his own default. Had Hudson tendered the whole amount of principal and interest the day the first installment of interest fell due, Mrs. Marsh would not have been compelled to receive it; but had he failed to pay or tender any amount on that day, then, on the next day, it would all have been due and payable, and a tender of the whole amount then, according to this theory, would have been good. This would place the entire matter in the hands of the obligor, and make him to decide according to his own interest.

It was held in the case of *Caruthers* v. *McBurney*, 3 Sneed, 590, that a stipulation in a contract for the sale of land, *that* the failure to pay the money on the day specified should render the contract void, was a stipulation for the benefit of the vendor, which he might waive, but which the purchaser could not insist upon; and we have applied the same principle in one or more unreported cases. And so we hold in this case, that the stipulation in question was for the benefit of the payee in the note, and has been waived, and that the obligation fell due eight years from date.

The decree will be reversed, and a decree rendered here in accordance with this opinion.

THE KNOXVILLE & OHIO R. R. CO. v. JNO. H. HICKS.

1. CONSTITUTIONAL LAW. *Construction. Legislative power. Power to grant charters, with exemption from taxation.* The Legislature possesses inherently all legislative power, and the Constitution is to be construed as limiting or restricting, but not as granting the power. The power to grant charters of incorporation, with exemptions from taxation, binding upon the State, so that the charter, after acceptance, becomes a contract and irrepealable, falls properly under the head of legislative power.

   Cases cited: Union Bank v. State, 9 Yer., 490; Hope v. Deaderick, 8 Hum., 1.

2. SAME. *Constitution of* 1834 *did not restrict the power.* Section 28, of Article 2, of the Constitution of 1834, to-wit: "All lands liable to taxation, held by deed, grant or entry, town lots, bank stock, etc., and such other property as the Legislature may, from time to time, deem expedient, *shall be taxable*," imposed no restriction upon the power of the Legislature to stipulate for total or partial exemptions from taxation in charters of incorporation.

3. SAME. *Sale of property. When it passes this immunity.* Under an act of the Legislature the State loaned its bonds to a railroad corporation, which by its charter, was exempt from taxation; said act reserving a right in pursuance of which a subsequent act was passed, providing for the enforcement of the State's lien in a court which was expressly empowered to determine all questions touching the rights of the State, and all other parties. In a proceeding instituted by the State against said corporation, it was adjudged, in *pursuance of said act*, that a sale of the property and franchises of the company would vest the purchasers with "all the rights, privileges and *immunities*," appertaining to the same. *Held*, that under the decree immunity from taxation passed to the purchasers; that the State having provided for the adjudication of these questions, and the purchase having been made on the faith thereof, it cannot question the validity of the adjudication.

   Case cited: E. T., V. & Ga. R. R. Co. v. Hamilton County, MS., Knox.

FROM ANDERSON.

Appeal from the Circuit Court. D. K. YOUNG, J.

JNO. BAXTER for complainant.

WM. CULLAM and H. R. GIBSON for defendant.

MCFARLAND, J., delivered the opinion of the court.

The plaintiff, a corporation, is the owner of a railroad extending from Knoxville to Careyville in this State. It paid to the collector of Anderson county the taxes assessed against it under protest, and brought this action to recover the amount back, claiming that the road and its appurtenances are exempt from taxation. The facts are presented by an agreed case. The railroad in question was constructed and owned by a corporation chartered by the Legislature of this State, under the style of The Knoxville and Kentucky Railroad Company. By an act passed 25th of February, 1856, which became part of its charter, the capital stock, and dividends, road and fixtures were exempted from taxation until the stock paid a dividend equal to the legal rate of interest. There can be no question but that the exemption was granted in express terms. The company had borrowed from the State a large number of its bonds, under the general internal improvement act of 1851–2, and having failed to pay the interest upon these bonds, proceedings were instituted in the chancery court at Nashville, under acts of the Legislature passed for the purpose, for the sale of this and other delinquent roads, to enforce the State's lien. The sale was made and confirmed, certain individuals being the purchasers. They afterwards organized under the general laws passed since the

adoption of the new Constitution, as a corporation, under the style of the Knoxville and Ohio Railroad Company, (the present plaintiff) for the purpose of becoming the owner of the road, with its franchises, and by a decree of the court at Nashville, title was vested accordingly.

Two important questions have been presented and ably argued. 1st. Whether the Legislature had the power, under the Constitution of 1834, then in force, to grant the exemption in question; and 2d. If the exemption was valid in favor of the original company, does that exemption still exist in favor of the present plaintiff as purchaser.

It has been settled, since the Dartmouth College case, that the charter of a private corporation, when accepted, becomes a contract, which cannot afterwards be impaired by legislative action when the power to do so is not reserved. Stipulations for exemption from taxation, or the payment of a bonus in lieu of taxation, are important elements of the contract, and are protected by sec. 10 of art. 1 of the Constitution of the United States, and a similar provision in the Constitution of the State. That the legislature of a State has the power to bind the State by such contracts, where that power is not denied by the Constitution, is also a result of these authorities. As often as this question came before the Supreme Court of the United States it was earnestly resisted, upon the ground that to permit one legislature to barter away the State's inherent right of taxation so as to bind successive legislatures, is subversive of the government itself, and

allows the burthens of taxation, which should fall upon all alike, to be shifted from the property of wealthy corporations to the shoulders of the remaining tax-payers. If this was a new question, it would deserve the most serious consideration, and courts would now doubtless hesitate long before establishing it; still, it is too well established to be at once overthrown, and so the counsel for the State concede. See *Gordon* v. *Appeal Tax Court*, 3 Howard, —; 4 Wheaton, 518; 4 Peters, 514; 1 Black, 436; 3 Wallace, 264; 7 Cranch, 164.

But these authorities all go upon the assumption that there is no constitutional restriction upon the power of the legislature to grant charters of the character in question. If this provision of the charter granting the exemption be in violation of the Constitution of the State, it would not be protected. Did the Constitution of 1834 of this State, in force at the time, restrict the power of the legislature in this regard? It must be borne in mind, that in determining what power the legislature of a State may rightfully exercise, the Constitution of the State is not to be regarded as a grant of power. The Legislature possesses inherently all legislative power, and the Constitution is to be construed as limiting or restricting, but not as granting the power.

The first question, then, is, does the power to grant charters of incorporation, with exemptions from taxation or other like stipulations binding upon the State, so that the charter after acceptance becomes a contract and irrepealable, fall properly under the head of legis-

lative power? That such power properly belongs to the legislative department of a State, when there is no special limitation of the power, is too well settled to be questioned. The decisions of the Supreme Court of the United States are numerous and uniform, beginning with the Dartmouth College case and coming down to the present time. *Pacific R. R.* v. *McGuire*, 20 Wall.; *Wilmington R. R.* v. *Reid, sheriff*, 13 Wall.; *Humphrey* v. *Pegues*, 16 Wall.; 1 Black, 436. It being, therefore, properly legislative power, it exists inherently, and we must look to the Constitution to see if any limit or restriction is placed upon the power of the Legislature in this regard. And, to understand properly the language of the Constitution of 1834 on this subject, we must bear in mind the terms of the previous Constitution, the powers that had been exercised thereunder, the changes made and the evils to be remedied, at the same time considering the different parts of the Constitution bearing upon the question. The Constitution of 1796 was especially defective in regard to securing equality of taxation, or the taxation of property according to its value; and this was the evil intended to be remedied by the change made, and embodied in sec. 28 of art. 2, in regard to the taxation of property according to its value, and securing the equality of taxation. But is there anything in the first clause of this section intended to limit the power of the Legislature to grant exemptions from taxation in charters of incorporation, or (which is the same) to stipulate for a bonus or fixed sum in lieu of taxation? The language is:

"All lands liable to taxation held by deed, or entry, town lots, bank stock, etc., and such other property as the Legislature may, from time to time, deem expedient, *shall be taxable.*" Was this intended to mean that thereafter the Legislature should not have the power to stipulate for total or partial exemptions from taxation in charters of incorporation? The Convention of 1834 comprised among its delegates some of the ablest lawyers the State has ever produced. That they were familiar with the principles of the Dartmouth College case, decided some fifteen years previously and followed in other cases, cannot be doubted. It is apparent, also, that they were familiar with the fact that the Legislature, under the previous Constitution, had exercised the power of granting charters with total or partial exemption, or contracting for a special bonus in lieu of taxation—notably, in the instance of the charter of the Union Bank, granted only two years before: *Union Bank* v. *The State*, 9 Yer., 490—and that the power had never been questioned. With these facts prominently before the Convention, if it was their purpose to restrict this power of the Legislature, we should expect to find such restriction expressed in unequivocal language. But the only direct provision in regard to the power of the Legislature in respect to charters of incorporation is in the proviso to sec. 7 of art. 11, to the effect that the restriction upon the power of the Legislature to grant special privileges, immunities and exemptions was not to be construed to affect the power of the Legislature to grant such charters of incorporation as they might

deem expedient for the public good, thereby leaving this power as it previously existed. See *Hope* v. *Deaderick*, 8 Hum., 1. If it had been the purpose of the Convention to restrict the power of the Legislature in this particular, this would certainly have been the appropriate place to insert the restriction. But, so far from doing so, we find only the proviso above referred to, which was intended only to exclude the idea that the first clause of the section against the granting of special privileges, immunities or exemptions, was intended to limit the power of the Legislature in regard to granting charters of incorporation.

From this the conclusion seems necessarily to follow, that the Legislature was still left the power to pass laws creating bodies corporate, with all the rights, privileges, immunities and exemptions which it was usual to vest in such fictitious persons under the general principle of law previously recognized; and, as we have seen, the power in question was previously recognized by the general law and the authorities of this State. We do not say that rights, privileges or immunities might be granted inconsistent with other positive restrictions of the Constitution; and this brings us again to the language of sec. 28 of art. 2, to-wit: "All lands liable to taxation held by deed, grant or entry, town lots, bank stock, etc., and such other property as the Legislature may, from time to time, deem expedient, *shall be taxable.*" It has never been contended that this made it imperative upon the Legislature to tax all property. That body might tax or

omit to tax, that is for the time exempt. If a tax was imposed it was required to be upon the value of the property and according to the rules of equality. This is made more apparent by the change made by the Constitution of 1870, which declares that all property, real, personal and mixed, *shall be taxed*, subject to the right of the Legislature to exempt in certain cases which are specifically defined. It is argued that the above clause makes all the property mentioned and such other as the Legislature might deem expedient, as continually subject to the power of taxation. That is, that it shall be and remain taxable, and that this forbids any action by the Legislature which would place property beyond the power of taxation. On the other hand, this section may well be construed as having no reference to the property of corporations to be created, and as leaving the power of the Legislature in this regard as it stood before. This is the more natural construction, when we take this section in connection with the clause before referred to, and find that no express restriction is placed upon the power conceded to have previously existed in the Legislature in respect to corporations, in that clause which refers directly to the power to grant such charters. Again, the Constitution of 1834 declared that a well-regulated system of internal improvement should be encouraged, and for such purposes the Legislature has often appropriated the revenues of the State, and further loaned the credit of the State to the extent of immense sums. The power to do this has never been questioned. If the Legislature can thus appropriate

and use the public money, it is difficult to see why it may not stipulate for the release of part of the public taxes for the same purpose, as it would be in effect the same. Upon this declaration of the Constitution the Legislature have from time to time freely acted. The State was without railroads. It was regarded as a public necessity that roads should be constructed. They were to be constructed by corporations—in a sense private corporations—and yet as it was believed that the resources of the State would be thereby developed and the public prosperity promoted, *they were regarded as public improvements*, and to be encouraged. *Pacific R. R.* v. *McGuire*, 2 Wal., 36. It was foreseen, that as a private speculation such enterprises would not pay, especially in those portions of the State where the cost of constructing the roads would be unusually heavy; perhaps in no instance has the individual who has invested his money in capital stock of a railroad in this State as an original stockholder, ever been able to realize his investment, the stock selling generally at very low figures. All this was to some extent foreseen, and to meet this difficulty and *induce* capitalists to risk their money in the enterprise, this proposition to exempt the property to be thus created was made, in consideration of the benefits expected to result to the public from the public improvement. The property now sought to be taxed was not then in existence; it has been created in part at least by the money invested upon the faith of this stipulation—much of it, for aught we know, may have been brought from other States. The peo-

ple of the State have certainly, to some extent, realised from the improvements the benefits anticipated, whether to the full extent or not is immaterial. It may or it may not have been a judicious contract upon the part of the State. The necessities for revenue now demand contribution from every available source. The property of some of these roads are valuable and exemptions are now odious. But if the law and the contract was valid at the time, we must in good faith abide by its terms according to its fair and just import.

Upon this question it may be added, that where there has been no judicial construction of a clause of the Constitution, the courts have given great weight to the construction given to the clause by other departments of the government. *Stewart* v. *Land*, 1 Cranch, 299; *Martin* v. *Hunter*, 1 Wheaton, 351; 6 Wheaton, 418; 12 Wheaton, 290. Several successive Legislatures that met while this Constitution was in force, a period of thirty-six years, granted charters of incorporation, with total or partial exemptions for a time, and during the entire period the power was never questioned. On the contrary, all departments of the government acquiesced and obeyed the laws thus passed, and under these nearly all of our public improvements have been constructed. This uniform action upon the part of the State authorities is entitled to great weight. Upon this question we conclude that the Legislature had the power to stipulate for the exemption in question.

This brings us to the next question, which is, Did

this exemption pass to the new corporation by this sale? It is argued that at the time of this sale, which was after the new Constitution went into effect, the Legislature could not grant an exemption from taxation; it is, however, admitted that it might transfer from one to another the existing exemption, but it is denied that this was done. After the appointment of commissioners upon the part of the State, to take the necessary steps against the delinquent railroads, it was found that in any attempt to sell the roads serious questions would arise as to the rights of the State and the defendants. Whether the State had the right to sell out the entire property and franchises of the companies, or only the State's lien or interest thereon, and what that interest was; whether the State could sell for the entire debt or only the unpaid interest on the bonds; how the rights of stockholders and others would be affected. To meet these difficulties an act was passed the 22d December, 1870, in pursuance of the right reserved in the general internal improvement act, which directed a bill to be filed in behalf of the State against the delinquent railroad companies in the chancery court at Nashville, which by the act was vested "with exclusive jurisdiction to hear, adjudge and determine all questions of law and matters of controversy of whatever nature, whether of law or of fact, that have arisen or may arise touching the rights and interest of the State, and also of the stockholders, bondholders, creditors and others in said roads." . . . "Also to declare the exact amount of the indebtedness of each of said companies

to the State, and likewise to define as may be thought proper what shall be the rights, duties and liabilities of a purchaser of the State's interest in said roads, or either of them, and what shall be the reserved rights of said companies, stockholders and others respectively as against said purchasers after said sale, under the existing laws of this State."

The bill was accordingly filed, and by a decree before the sale the amount of the State's debt was ascertained and adjudged, and also that the same was a lien upon the entire property, rights, privileges and franchises of the companies; that a sale would transfer all the interest, leaving none in the stockholders or corporation; that a sale of any of the franchises of said company would vest the purchasers with all the rights, privileges and *immunities* appertaining to the franchises by the charter and amendments. A sale was made, reported and confirmed and title vested, as before stated. Without reciting the parts of the various decrees and proceedings bearing upon the question, it is sufficient to say that it is distinctly adjudged that not only the property of the old company, but all its rights, franchises, privileges and immunities, as defined by the charter and laws and the decrees in the cause, passed to and vested in the new company.

We are of opinion that the State having expressly provided for the adjudication of all these questions by the tribunal appointed, and the purchase having been made upon the faith thereof, the validity of the adjudication cannot be now questioned by the State. But it is argued that under the decree vesting the

new company with the rights and franchises of the old company, the exemption from taxation did not pass; that this decree could not have the effect of putting the new company exactly in the shoes of the old in all respects, so as to make the new company the same legal entity as the old; this result could only be effected by a purchase and transfer of all the stock of the old company, or by the soverign power of the State through the Legislature where that is allowable, and as a consequence, although the property of the old company was transferred to the new with the privileges and franchises necessary to the use and enjoyment thereof, yet the legal existence of the old corporation was not hereby completely annihilated, but said corporation still existed, and to that existence the exemption in question still adheres as an incident not having been in terms transferred by the Legislature. We cannot clearly appreciate the idea of the right of exemption existing in the old company after all its property and franchises appertaining to the use thereof was gone from it, and vested in the new. Even if the old corporation still existed in the abstract, it certainly no longer had a practical existence for the purposes of its creation, and certainly to say the exemption in question still existed in the old company when there was nothing upon which it could operate, would have no meaning.

It is manifest that when the purchasers came to contract for the entire road and franchises, it was important to know whether they were to have, as purchasers, the right to own and use the property free

from taxation and specified in the old charter. This was an important element in fixing the price. The property, with this exemption, was worth more than it would have been without it. A sale of the property and franchises without this exemption would practically have taken from the old company all that was valuable to it, and yet the purchaser would not acquire what the old company owned; the old company had the property and franchises with the exemption, while the new one would acquire the property and franchises without the exemption. This would be selling the entire property and franchises of the old company for the payment of its debts, and yet destroying an important element of its value—refusing to give the old company the benefit of the exemption in the sale, and yet destroying its existence so far as of practical importance. By this means the exemption would be practically repealed, and the State would be allowed to resume the right of taxation over the property and franchises in question, which it could not have done had the old company continued to be the owner.

This argument is used to show that the parties must have understood from the adjudications to which we have referred, that they were purchasing with the exemption and with every element of value which attached to the property and franchises in the hands of the old company, and such we think is the fair and legitimate construction of the proceedings referred to. The case of *Trank* v. *McGuire et als.*, from the Supreme Court of the United States, is wholly different.

There the said road, etc., was purchased by the State of Missouri, and of course the exemption was merged, as the exemption from the right of the State to tax would mean nothing when the State itself became the owner of the property. And so the State having become the absolute owner, when it came to sell the said road again, could sell with or without the right of exemption without injustice to any one; but as the new Constitution of Missouri, before the resale by the State, had forbidden the grant of such exemption, it was held that the Legislature could not authorize a sale with the exemption. But here the State never became the owner of the road, and the principle of the case does not apply.

This opinion was prepared more than a year ago, and since then we have seen the recent case decided by the Supreme Court of the United States, *Morgan v. Louisiana*, 3 Otto, 217. There are probably more points of difference between that case and this; the exemption there was of the capital stock, works, workshops, warehouses, vehicles of transportation and other appurtenances of the company. It is certainly clear, as said in that case, that a purchaser of an engine or car from the company would not hold such property exempt from taxation, or that the purchaser of a horse would not hold it exempt from execution because it had been exempt in the hands of the persons from whom it was purchased. But here the entire road as a whole was held free from taxation; it was purchased with all its appurtenances as a whole, with the franchises of the old company, that is, the right to

use the property as the old company had the right to use it, and if the purchaser acquires all that was valuable, the exemption must attach to the property, especially as the decree settles that all rights and immunities passed, and nothing remained in the old company. With great respect for the high tribunal making the decision, we are not convinced by it that the exemption in such a case is a mere personal privilege that cannot pass to a purchaser of the entire road with franchises, without a new legislative grant; the exemption being part of the charter, cannot be repealed by the Legislature; it is a right for which a consideration has been given, but the decrees of the court in this case are in pursuance of the act of the Legislature and are equivalent to a legislative grant. Though the State has obtained the benefit of a sale purporting to be with the exemption, we think the case of *Tomlinson* v. *Branch*, 15 Wal., 460, sustains our conclusions. See also *Philadelphia, Wilmington and Baltimore R. R.*, 10 Howard, 376.

It will be observed that the question whether an exemption is granted in the charter in the first instance, or what language is necessary to grant an exemption, as presented at the present term in the case of the *E. T., V. & Ga. R. R. Co.* v. *Hamblen County*, is a different question from the one we are now considering, as to the transfer of such exemption upon a sale of an entire road and franchises to a purchaser; the latter question is not governed by the same reasons or rules of construction, but the decrees

in this case pass to the purchaser the entire franchise, with the rights and immunities appertaining thereto.

We hold upon both questions for the plaintiff, and decree that the judgment be reversed and judgment entered for the plaintiff.

FREEMAN, J., said:

We place our concurrence as to the first question, upon the ground that this being a public improvement, the Legislature might grant it aid and appropriate money for its use, and releasing taxes in its favor is the same in effect; but we reserve the question as to the power of the Legislature to make such exemptions in favor of private corporations not chartered for the purpose of constructing public improvements.

NASHVILLE,.....DECEMBER TERM, 1876.

JNO. C. ORGAN, Adm'r, etc. *v.* SAMUEL ALLISON.

STATEMENT OF CASE:—In 1856, Moores borrowed $1,000 of plaintiff's intestate, and executed his note under seal, and Allison also signed the note with his seal, as a surety; other sureties also signed the note with their seals, and lastly it was signed by one of the partners, N. Ward, by his firm name of N. & S. Ward, with a seal annexed to the signature of the firm, and was then delivered by Moores to intestate and the $1,000 paid over to him. When the note was delivered to Gordon, the intestate, it had no blot on, or erasure of the seal to the firm name of N. & S. Ward, but when the suit was brought, in 1867, there was an oblong blot, or obliteration of the word seal, made by ink of a different color from that in which the note, signatures and seals thereto were originally written. There is no direct evidence showing when, how or by whom the word seal was effaced.

1. BILLS AND NOTES. *Seal. Obliteration of. Evidence. Alteration of written instrument. Principal and surety.* The erasure of a seal under the circumstances of this case, was such an alteration as changed the legal character and effect of the instrument, and was therefore material, and released the surety upon the same.

   Cases cited: Blair *v.* Bank of Tenn., 11 Hum., 84; Crockett *v.* Thomason, 5 Sneed, 345.

2. SAME. *Same Same.* It is not necessary to release the surety that the alteration should be made by the party entitled under it, or the payee or holder thereof.

3. SAME. *Same. Same. Presumption of law.* If it appears from the face of the writing, that a seal was annexed to the name of N. & S. Ward, and there are grounds of suspicion that said seal has been erased, the burden of showing when the same was made, the person by whom made, and the intent with which it was made, is upon the plaintiff. As to whether there was a seal, and whether the mark after their

name is an erasure, are questions of fact for the jury to determine; if they should think such mark was a mere blot, put there by accident, or a stranger, it would not be an alteration.

FROM SMITH.

Appeal from the Circuit Court. ——— ———, J.

No counsel marked.

DEADERICK, C. J., delivered the opinion of the court.

This case is brought from the Circuit Court of Smith county by writ of error. It is an action brought on a note under seal—one Moores being principal, and defendant Allison and others sureties.

More than half the record consists in pleas, replications, demurrers and motions to strike out, etc. But the material and controlling question arose on the following facts, under the pleas of *non est factum*.

In 1856, Moores borrowed $1,000 of plaintiff's intestate and executed his note under seal, and Allison also signed the note with his seal, as a surety; other sureties also signed the note with their seals, and lastly it was signed by N. Ward, one of the partners, by his firm name of N. & S. Ward, with a seal annexed to the signature of the firm, and was then delivered by Moores to the intestate, and the $1,000 paid over to him.

When the note was delivered to Gordon, the intestate, it had no blot on, or erasure of the "seal," to the firm name of N. & S. Ward; but when the suit was brought, in 1867, there was an oblong blot

on, or obliteration of the word "seal," made by ink of a different color from that in which the note, signatures and seals thereto were originally written. There is no direct evidence showing when, how or by whom the word seal was effaced.

Bowen, the son-in-law of Gordon, who was examined as a witness by defendant, stated that when Moores delivered the note to Gordon, the latter remarked that he thought Nathan Ward knew better than to sign the firm name to a seal," etc.

The defendants offered to prove by witnesses how the obliteration seemed to have been made, whether by accident or design, but plaintiff objected, and the court sustained the objection and the evidence was excluded.

The plaintiff excepts to the charge of the court, in its instructions upon the question of the alleged alteration of the instrument sued on.

The court stated to the jury that any material alteration in a bill single, or promissory note, after its execution, made by payee or maker, without the surety's consent or ratification, would release him; and further, states "that in order to release the surety, it is not necessary that the alteration should operate to the prejudice of the party sought to be charged, for the identity of the instrument is changed, and another is substituted without his consent."

This latter paragraph of the charge, it is insisted, is inconsistent with the rule laid down in *Blair* v. *The Bank of Tennessee*, 11 Hum., 84. In that case the court say: "The alteration of a note or bill which

will have the effect to discharge the party bound, must be in a material part. If the alteration does not affect the rights or responsibilities of the parties it will not render the instrument void, in the absence of a fraudulent intent." Again, it is said in that case, if the alteration does not give the instrument a *different legal effect*, and no one can be misled or prejudiced thereby, it is not an alteration in the sense of the law. Citing 1 Greenl. Ev., secs. 565–6, where one reason for the rule that instruments that are altered in the legal sense of that term are thereby made void, is stated to be to insure the identity of the instrument and prevent the substitution of another, without the privity of the party concerned. *Ibid*, section 565.

This section of Greenleaf's Ev. is quoted and approved in the case of *Crockett* v. *Thomason*, 5 Sneed, 345, where Judge Caruthers says, the alteration "imports a fraud in law, whether so intended or not, *and even if no injury is done*, and the change abandoned by the party, in whose favor it was intended to operate, the consequence, upon strong grounds of policy, and settled rules of law, is the same."

In the case of *Blair* v. *The Bank*, the alleged alteration consisted simply in adding the christian and individual names of the drawers to the bill; and this addition, it was held, did not change the meaning, or give to the instrument a different legal effect, and was therefore not an alteration of the instrument in the sense of the law, and consequently immaterial. Gr. Ev., sec. 567. "Any alteration which causes the in-

strument to speak 'a language different in *legal effect*, from that which it originally spake, is a material alteration." Greenl. Ev., 565.

In the case in 5th Sneed, the note, as originally written, fell due 25th December, 1854, and was altered so as to fall due 25th December, 1853, by writing the figure 3 over the figure 4, in 1854, and this was held properly to be a material alteration, rendering the note void—changing, as it did, the meaning and legal effect of the instrument.

The alteration in this case, if it be an alteration, as contradistinguished from the spoliation or mutilation of the instrument by the act of a stranger to the contract, consists in the erasure of the seal annexed to the names of N. & S. Ward.

Assuming it to have been done by the payee or principal obligor in the note, did it alter the legal meaning or effect of the instrument? If it did, it was a material alteration, and rendered the note invalid as against the defendant, who signed it with Ward, and at or about the same time as a surety. N. Ward had no power to bind his partner by signing their firm name under seal. The proof also discloses that neither partner had any power to bind the firm as surety or accommodation endorser.

As the signature originally stood, N. Ward was bound under the seal; as altered, he was not. In the last case the statute of limitations of six years would protect him against a recovery on the claim, while before he had no such protection, or advantage over his co sureties. The legal effect of the instru-

ment was, therefore, changed by the alteration. The alteration changed the legal character and effect of the instrument, and was therefore material, and the surety was not bound thereon. The charge of the court was therefore correct on this point.

The court below further instructed the jury, if Moores, the principal, or Gordon, the payee, erased the seal to the signature of N. & S. Ward, without the knowledge or consent of Allison, he, Allison, would be released thereby. And this, it is insisted, is error, as it is argued that the alteration, to avoid it, must be made by "the party entitled under it, or the payee, or holder thereof."

The case of *Wood* v. *Steele*, 6 Wal., 80, was the case of an alteration of the date, by the maker, before delivery to the payee, and it was held that the security was discharged. The court in that case say, that a material alteration in any commercial paper, without the consent of the party sought to be charged, extingnishes his liability, and adds, that the grounds of the discharge is, that it is no longer the contract into which defendant entered; its identity is changed; another is substituted without his consent; and by a party who had no right to consent for him. See also 1 Greenl. Ev., sec. 565. There was, therefore, no error in the charge of the court on this point.

The court further charged the jury, if there are palpable alterations on the face of the instrument, the presumption of law is, that they were made at the time of signing. If any ground of suspicion is apparent upon the face of the instrument, the law pre-

sumes nothing, but leaves the questions of the time when it was done, as well as that of the person by whom, and the intent with which the alteration was made, as matters of fact, to be found by the jury, upon evidence, to be adduced by the party offering the instrument in evidence.

The court further said: "If it appears from the face of the writing that a seal was annexed to the name of N. & S. Ward, and there are grounds of suspicion that said seal has been erased, the burden of showing when the same was made, the person by whom made, and the intent with which it was made, is upon the plaintiff. As to whether there was a seal, and whether the mark after their name is an erasure, are questions of fact for you to determine. If you should think such mark is a mere blot put there by accident or a stranger, it would not be an alteration." The judge then properly instructed the jury as to the difference between an alteration and spoliation. This part of the charge is fully sustained by sec. 560, 1 Greenl. Ev., and is partly extracted from it.

The jury, upon a correct charge, found that the obliteration of the seal was an alteration, and in view of the fact that it is clearly shown no such obliteration existed at the time the note was delivered by Moores to Gordon, and that he or his personal representatives were from that time and until its production in this case in possession of the note, and in view also of his remark when the note was delivered to him, about the want of power in one partner to bind another under seal, as well as from the appear-

ance of the mark itself, and total absence of explanation, we are of opinion they were warranted in their conclusion that the alteration was such a material alteration as to extinguish the liability of said Allison on said note.

The judgment will be affirmed.

STEIFEL & PFEIFER *et al.* v. ED. & ELLEN CLARK *et al.*

1. MARRIED WOMAN. *Power to dispose of separate property. Mortgage.* Holmes Erwin sold the lot to Edward Clark, in trust for his wife, Ellen, the deed providing that said Ellen should have the power of disposing of said property by deed or will, as if she was a *feme sole*. *Held*, that this power carried with it the power to mortgage. Same principle decided in the unreported case of *Williams* v. *Whiteman*, September term, 1875, at Jackson. This case distinguished from the case of *Temple* v. *Head*, 4 Heis., 34, where the power conferred upon the *feme covert* was to dispose of by last will and testament, or by deed of gift.

2. PERSONS UNDER DISABILITY. *Guardian ad litem.* Ordinarily, an idiot or lunatic should defend a suit by his committee; but if he has no committee, another person will be appointed his guardian *ad litem* to defend the suit.

FROM DAVIDSON.

Appeal from the Chancery Court. ————, Ch.

W. F. COOPER, JOHN REID, JNO. LAWRENCE and S. CHILDRESS for complainants.

BAXTER SMITH, JOHN A. CAMPBELL and JOHN L. FARE for defendants.

DEADERICK, C. J., delivered the opinion of the court.

The bill in this case was filed in the chancery court at Nashville by complainants, August 21, 1868, to foreclose certain mortgages made by Clark and wife on a lot in Nashville. Holmes Erwin had sold and conveyed the lot in May, 1864, to Edward Clark, in trust for his wife, Ellen, the deed providing that said Ellen should "have the power of disposing of said property by deed or will as if she were a *feme sole*."

On the 21st February, 1865, Clark and wife conveyed to James Doyle eleven feet of said lot to secure $2,000, loaned by Doyle to them. On the 29th August, 1865, Clark and wife conveyed to complainant, Steifel, the whole of said lot, to secure $3,780, borrowed by them of said Steifel. On the 5th September, 1867, Clark and wife conveyed to D. F. Wilkin, in trust, fifty-three feet of the sixty-four feet, the whole width of said lot, to secure certain other debts due to Doyle, providing further, that if the $2,000 loaned upon the mortgage of the eleven feet should not be adequately secured thereby, any balance remaining unsatisfied should be paid from the fifty-three feet therein mortgaged.

These several debts thus secured by mortgage, it is alleged were contracted to enable the said Clark and wife to pay purchase money and for improvements erected upon the lot mortgaged. Clark and wife having failed to answer, a judgment *pro confesso* was

entered against them at April term, 1869, but at the same term it was set aside upon affidavit made, setting up that Mrs. Clark had become insane since the commencement of this suit. Baxter Smith, Esq., a solicitor of the court, was appointed her guardian and leave was given him to answer, which was subsequently done.

In the progress of the cause, Holmes Erwin, the vendor of the lot, filed his petition, setting up his vendor's lien, with a copy of his deed to Clark, as trustee for his wife, which retained a lien upon its face for a balance of unpaid purchase money, and a note upon which several payments had been made, leaving a balance of purchase money due him, November 17, 1871, of $2,228.54. The several mortgages mentioned were all duly registered, after privy examination of the wife of said Clark.

Mrs. Clark, it seems, had been placed in the lunatic asylum about the 1st of March, 1869, and still remains there. The chancellor rendered a decree in favor of Holmes Erwin, the vendor, for the balance of the purchase money found due upon the account taken by order of the court; and held that the deed from Erwin to the trustee did not confer upon Mrs. Clark the power to mortgage the lot conveyed, but that the creditors who had advanced money to Mrs. Clark, which had been expended in paying the purchase money or in making improvements upon the lot, might have a lien upon the lot, the former to the extent of the balance of the purchase money due, the latter to the extent that the money expended had

enhanced its value. From this decree both parties appealed, but the guardian *ad litem* and Edward Clark alone executed an appeal bond. The decree appealed from was final and such an one as either party might as matter of right have appealed from, and the appeal brought up the whole case to this court for revision.

It is argued that the defendant, Mrs. Clark, could not defend by guardian *ad litem*, and that her defense should have been made by her committee or regular guardian, and that it was error to render any decree to her prejudice, unless she was thus represented. Ordinarily, an idiot or lunatic should defend a suit by his committee, but if he has no committee, another person will be appointed his guardian *ad litem* to defend the suit. Sto. Eq. Pl., sec. 70; Danl. Ch. Pl. and P., 483. It is also argued, earnestly, that at the time of the execution of the several mortgages, Mrs. Clark was incapable, by reason of being of unsound mind, to bind herself by contract. Several witnesses testify to acts and conduct on her part in 1863 and 1864, that seem to have proceeded from a condition of temporary insanity. But this state of mind seemed to be paroxismal and of short duration, followed by complete restoration to reason. Other witnesses testify to her mental capacity long after 1864, and during the years in which the deeds of mortgage were executed, she conducted the business in which she and her husband were engaged, bought and sold their goods, negotiated and closed the purchase of the lot upon which she built, and raised the money by bor-

rowing with which the improvements made were paid for, and was esteemed as a woman of more than ordinary capacity in the management of her business, by those who had transactions with her. Of her capacity to execute the deeds of 1865–6, we have no doubt, and we do not find in the record any sufficient evidence to authorize us to say that she had not capacity to understand and execute that of 1867. There is nothing to excite any suspicion of unfairness in any of the transactions. On the contrary, the debts secured seem to have been chiefly, if not wholly, for borrowed money, at six per cent. interest. But the defense mainly discussed and relied on is, that under the powers conferred by the deed by Erwin, Mrs. Clark could not give a valid mortgage on the lot, or convey it otherwise than by deed of bargain and sale, or by last will and testament. The language of the conveyance is, to Edward Clark as trustee, "for the sole and separate use of the said Ellen Clark, free from the debts and liabilities or control of her husband, the said Edward Clark; the said Ellen Clark to have the power of disposing of said property by deed or will, as if she were a *feme sole*."

Numerous cases have been cited by counsel for and against the proposition that the power of disposition by deed includes the power to mortgage. This direct question was decided in the unreported case of *Williams* v. *Whiteman*, at September term, 1875, of this court at Jackson. In that case, in an elaborate opinion by Judge Freeman, reviewing the decisions in Tennessee and other authorities, it was held "that a

power to dispose of, would necessarily carry with it the power to encumber or charge, as the greater includes the less, and on the same principle that a power to sell would give the power to mortgage or charge the same." See also 4 Kent's Com., 148.

Following this case, we hold that Mrs. Clark, under the powers conferred in the deed, had the power to mortgage the property conveyed. The case of *Temple* v. *Head*, 4 Heis., 34, is not in antagonism to this construction. In that case it was held, Judge Turney delivering the opinion, that the wife had no power to mortgage under the power conferred by the marriage contract, "to dispose of by last will and testament or by deed of gift." The execution of the power is limited to a particular mode, and in such case the prescribed mode must be pursued, and a negative of any other mode is implied. The kind of deed that could be made under the power to Mrs. Temple, was restricted to a deed of gift, and it was, therefore, held that a mortgage or deed of trust is not the manner or mode designated in the deed of settlement. In this case there is no such restrictive language limiting and defining the character of deed by which the conveyance may be made; and, as before stated, the comprehensive power of disposition by deed includes not only the power to sell absolutely, but also the power to mortgage, which is a conditional sale. It follows, therefore, that the chancellor's decree must be reversed, and that after satisfying the vendor's lien, the mortgagors will be entitled to satis-

faction of their several claims, from the sale of the property in the order of their priority, after first retaining an amount sufficient to pay the costs.

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STATE OF TENNESSEE *Ex Rel.* BLOOMSTEIN *v.* SNEED.

1. CONSTITUTIONAL LAW. *Mandamus against State officer. Not maintainable. When.* A proceeding by *mandamus* to compel an officer of the State to do that which the Legislature has prohibited him from doing, is in effect a suit against the State, and was not maintainable prior to the act of 1855, (Code, sec. 2807), nor subsequent to the repeal of that act by the Legislature in 1865. It therefore follows that a tax collector cannot be required, by this form of action, to receive notes of the Bank of Tennessee, emitted after May 6th, 1861, in payment of relator's taxes, under the 12th section of the Bank charter, enacted in 1838, in the face of legislative instruction to the contrary, even though the notes were issued during the time that sec. 2807 of the Code was in force, that section being considered as an ordinary act of legislation in regulating the jurisdiction of the courts of the State, and not such an act as would so incorporate itself with the 12th section of the Bank charter as to constitute a part of the contract between the State and the holders of the notes.

Cases cited: Williams *v.* The Register of West Tennessee, Cooke, 218; M. & C. R. R. *v.* The State and the Bank of Tenn., 3 Baxter, 395.

Statutes cited: Chapters 13, 44 and 118, acts of 1875.

2. SAME. *Obligation of contracts. Not impaired by laws prohibiting receipt of new issue Bank of Tennessee notes for taxes.* There is no obligation on the part of the present State government to receive the notes of the bank issued after the inauguration of the rebel State government, in payment of taxes due the State. For, although as between the bank and the holders, these notes are valid and protected from impairment through hostile State legislation, by the Federal Constitution, yet sec. 12 could only have been operative upon the bills or notes emitted dur-

ing the existence of the illegal State government through the re-enactment or tacit recognition thereof, by such State government, which had no power to commit the State to the terms of the contract imposed thereby for a period longer than its own existence. It was therefore competent for the restored State government to repudiate these notes, so far as its liability to take them for taxes was concerned, the guaranty of the illegal State government not having been under the protection of the Federal Constitution.

Case cited: The State and Watson, trustee, *v.* The Bank of Tenn. *et al.*, 5 Baxt., 1.

FROM DAVIDSON.

Appeal from the Common Law Court at Nashville. Judge J. C. GUILD presiding.

R. McP. SMITH for the relator.

The ATTORNEY GENERAL for the defendant.

NICHOLSON, C. J., delivered the opinion of the court.

This is a petition by Jacob Bloomstein, in the common law court, for a peremptory *mandamus*, requiring Thomas H. Sneed, tax collector for Davidson county, to receive from him $130 in the notes of the Bank of Tennessee, issued after May 6th, 1861, in payment of his State taxes for the year 1872. The attorney general for the State assigned various causes of demurrer, which were sustained by Judge Guild, and the petition dismissed.

The first question raised by the demurrer is, as to the jurisdiction of the common law court to grant the writ of *mandamus*. The petitioner bases his application upon a right secured to him by section 12 of the charter of the Bank of Tennessee, which provides,

that "the bills or notes of the said corporation, originally made payable, or which shall have become payable on demand, in gold or silver coin, shall be receivable at the treasury of the State, and by all tax collectors or other public officers, in all payments for taxes or other moneys due the State." It is assumed that by virtue of this provision of the bank charter, the State entered into a contract with every holder of any of the bills or notes of the bank, by which she bound herself that the same should be received by her tax collectors, in payment of taxes due the State; and that the notes so tendered to Sneed, as tax collector, were issued by the bank.

It is further insisted, that the obligation of this contract is protected from impairment, by the Constitution of the United States.

These positions are sustained by the holding of the United States Supreme Court in a case in 8 Wallace, in which case, this same provision of the bank charter was involved. In that case the notes of the bank tendered had been issued prior to the 6th of May, 1861, and no question as to the jurisdiction of the State court was raised. It was decided that the State was bound by her contract, to receive the notes of the bank issued before May 6th, 1861, in payment of taxes, but as to the notes issued subsequent to that date, the question was waived.

Assuming, then, for the present, that the contract entered into by the State, by reason of the 12th section of the bank charter, includes the notes tendered by petitioner to the tax collector, the question is,

Did the common law court have jurisdiction to require the tax collector to receive them?

It is a legal as well as political axiom, that no sovereign government can be sued in its own courts, except by its own consent. By our Constitution, "suits may be brought against the State, in such manner and in such courts, as the Legislature may, by law, direct." But this constitutional provision remains a dead letter, until some mode of proceeding is pointed out by the Legislature. *Williams* v. *The Register, etc.*, Cooke, 218. At the time the bank charter was passed, in 1838, the Legislature had pointed out no mode, by which the State might be sued in the courts. There was then at that time no statute of the State authorising the enforcement of this contract in the courts, and consequently no such statute entering into that contract, and constituting part of its obligation. The holders of the notes could only rely upon the good faith of the State, through legislative enactments, for the enforcement of the contract. It is clear, therefore, that while the Constitution of the United States protected the obligation of the contract from impairment by the State, there was no law furnishing a remedy for its enforcement, which constituted any part of the obligation of that contract, and the State was under no obligation to furnish any other remedy than that then existing.

It is true, however, that in 1855, the State gave her consent that suits might be brought against her as against individuals; and this law remained in force until 1865, when it was repealed, and since that time

no law has been enacted authorizing suits against the State. It was during this period that the act of 1855, carried into the Code, sec. 2807, was in force, that the notes of the bank now in controversy, were issued; and down to its repeal in 1865, the holders of the notes so issued had the right to enforce the contract of guaranty, contained in the 12th section of the bank charter.

But the act of 1865 was an ordinary act of legislation, regulating the jurisdiction of the courts of the State, and furnishing a new remedy by way of suits against the State. This act contained no stipulations, that it might not be afterwards modified or repealed, if in the judgment of the Legislature, its modification or repeal should be demanded by the public interests. Nor could such a contract be implied from the passage of the act of 1855. As held by the Supreme Court of the United States, in the case of *Beers* v. *The State of Arkansas*, 20 How., 530, it was competent for the Legislature to repeal the act of 1855 altogether, and put an end to the jurisdiction of our courts in suits against the State; and in exercising this power, the State would violate no contract with the parties. It would be merely regulating the proceedings in her own courts, and limiting or withdrawing the jurisdiction she had before conferred, by the passage of the act of 1855.

It was said in the case of *Butler* v. *Pennsylvania*, 10 How., 402, that "the contracts designed to be protected by the 10th section of the 1st Art. of the Federal Constitution, are contracts by which perfect rights,

certain, definite, fixed private rights of property are vested. These are certainly distinguishable from measures or engagements adopted or undertaken by the body politic, or State government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require."

It was upon these principles that we held, at the present term, in the case of the *M. & Ch. R. R. Co.* v. *The State and the Bank of Tenn.*, that the State was not liable to be sued for deposits made by the R. R. Co. in the Bank, in 1863.

But the Legislature has not stopped by simply repealing the act of 1855, (Code, sec. 2807), which authorized suits to be brought against the State. In 1873, by chap. 13, it was enacted, that "no court in the State has, nor shall hereafter have, any power, jurisdiction or authority to entertain any suit against the State, or against any officer of the State, acting by authority of the State, with a view to reach the State, its treasury, funds or property," etc.

By chap. 44 of the acts of 1873, it was enacted that whenever any tax-payer conceives that the taxes demanded of him are unjust or illegally demanded, his only remedy is to pay the taxes under protest, and afterwards sue the collector; and no officer of the State is to be "subjected to any suit for a refusal on his part to accept in payment of revenue to the State, any kind or description of funds, or securities, or papers, other than such as he may be authorized and required to receive for the time being, by law."

By chap. 118 of the acts of 1873, it is provided, that "tax collectors shall receive in discharge of the taxes and other dues to the State, bank notes of the Bank of Tennessee, known as old issue, warrants on the treasury, legally outstanding, gold, silver, national bank notes, United States legal tender notes, and nothing else."

It is manifest, that if these provisions of the statutes are valid, the common law court had no jurisdiction to entertain the application for a *mandamus*. The prohibition is explicit against the receipt of the notes in controversy by the tax collectors, and against the power or jurisdiction of any court in the State to entertain a suit against such collector for refusing to receive the new issue for taxes due the State.

It is insisted for the petitioner, that these provisions of the statutes impair the obligation of the contract of guaranty, by which the State agreed to receive the notes of the Bank of Tennessee in payment of taxes, for the reason that they furnish no remedy by which the holder of the notes can enforce the contract by suit. This position rests upon the assumption, that before these statutes were passed, the holders had the remedy by *mandamus*, which being taken away, they are now without any, or at least without any adequate remedy. The error of this argument is, in assuming that the holders of the notes have ever had any remedy by suit, since the repeal of sec. 2807 of the Code. As against the State, there is no common law remedy by *mandamus* without the consent of the State. There was no such remedy when the State entered into the

contract, and there has been none since the repeal of the section 2807 of the Code.

We have already seen that even while the section 2807 was in force, that it did not so incorporate itself with the 12th section of the bank charter, as to constitute a part of the contract between the State and the holders of the notes. It was no more than a privilege or permission granted by the Legislature to the note-holder, which was subject to be withdrawn whenever the public interests required it. The case of *Williams* v. *Register of West Tennessee*, Cooke, 214, is conclusive of this question. In that case, an application was made for a *mandamus* to compel a register to issue a grant, although the Legislature had prohibited its issuance. It is said by the court, that to grant a *mandamus* in this case, would, in effect, sanction the idea that the State may be sued. It was held, that the act of the Legislature forbidding the issuance of the grant was void, because of its repugnance to the Constitution, yet the court say, they cannot perceive that they possess any physical power to compel the State to issue the grant. The reason was, that the disposition of the soil was an attribute of sovereignty belonging peculiarly to the Legislature. So in the present case, the providing of revenue for the State is an attribute of sovereignty, and by the Constitution the exercise of this attribute of sovereignty belongs to the Legislature. That power has forbidden its revenue officers to receive the new issue, in payment of taxes, and has withheld from the courts any

jurisdiction to entertain a suit for refusal to receive such payment.

It follows, that even if the statutes forbidding the receipt of the new issue by the tax collectors was unconstitutional, yet the common law court had no jurisdiction to compel its reception. Much less does such jurisdiction exist, when the repeal of the act authorizing suits against the State, and the forbidding of any suit against the collectors for refusing to receive it, does not violate that provision of the Federal Constitution, which protects the obligation of contracts from impairment by State legislation.

We have, thus far, considered the case upon the assumption, that the 12th section of the bank charter constitutes a contract between the State and the holders of the notes of the bank, which is valid and binding, as between the State and the holders of the notes, issued after the 6th of May, 1861. In this view our inquiry has been confined to the question of jurisdiction in the courts, to entertain the suit. It remains now to consider, whether there is any obligation on the present government of the State to receive the notes issued by the bank, during the existence of the rebel State government?

We have held in the case of the *State and Watson* v. *The Bank and others*, that as between the bank and the holders of the new issue, the notes were valid and binding on the bank. It does not follow, that as between the State and the holders of this issue, there is any obligation on the part of the State, to receive the notes in payment of taxes due to the State government.

When the Bank was chartered in 1838, the State undertook to receive the issues of the Bank in payment of taxes assessed for the support of the State government, then in operation. That State government, however, was supplanted by the military *de facto* government which was inaugurated by the Legislature, and carried out by a majority of the people in 1861, in the acts by which it was attempted to separate the State from the Federal Union, and to declare its independence. These acts were invalid and void, so far as they were intended to affect or to change the relation of the State to the Federal Union; but they were effectual, for the time, in expelling the authority of the United States government and in setting up a new local government, in the place of the State government supplanted. The State remained in the Union, and the Constitution of the United States continued to exist and to operate within the State during all the time that the usurped government was in existence. The laws which had prevailed before the attempted revolution, so far as they were not expressly repealed or changed by the Legislature of the *de facto* government, continued in force, as between the citizens of the new government, and their private contracts continued under the protection of the Federal Constitution.

In this way the charter of the Bank continued in force, and its transactions, as a body corporate, were valid and binding, as between the Bank and their dealings with it. Its capacity to receive deposite, and issue a circulation, was the same after as before

the inauguration of the new government. The contracts made by the Bank with the citizens dealing with it, were protected from impairment by the Federal Constitution as effectually, during the existence of the usurped government, as before. Hence, it was held by this court, in *The State and Watson* v. *The Bank*, that the acts of the Legislature of the restored State government, by which it was sought to repudiate the issues of the Bank, were null and void, because they impaired the obligation of contracts between the Bank and holders of its notes.

But as the State was held not to be a party to that suit, no opinion was expressed as to the power of the Legislature of the restored State government, to repudiate the obligation of the State, under the 12th section of the Bank charter, to receive the notes of the Bank, issued during the usurped government, in payment of taxes assessed to support the restored government of the State.

It is well settled, that all legal and valid contracts between citizens of the rebel States, were so far under the protection of the United States Constitution, during the prevalence of the rebellion, that they could not be impaired by the legislation of the restored State governments. The question presents itself, was the contract of guaranty between the State and the holders of the new issue, arising under section 12 of the Bank charter, under the protection of the Federal Constitution during the rebellion? If so, then the act of the Legislature repudiating that issue

was invalid—if not, then that act was legitimate and effective.

The contract was, that the State would receive the notes of the Bank in payment of taxes due the State. We are to regard the 12th section of the Bank charter as having been re-enacted, or tacitly recognized as in force, by the new government, inaugurated in May, 1861. It was therefore an attempt, by the usurping government, to bind the State to guaranty the notes of the Bank issued during the existence of the new government, by agreeing to receive them for taxes assessed to support the usurping government. But it has been settled by repeated judicial decisions, that the political status of the State was never affected or changed by the action of the usurping Legislature, but that she continued a member of the Federal Union, under the guarantees of the Federal Constitution. It has been also repeatedly decided, that the government inaugurated in the place of the legitimate State government, was only operative as a military or *de facto* civil government, but in as far as it was opposed to Federal government, or to the legitimate State government, that it was an illegal usurpation. To hold, therefore, that the contract, raised by the 12th section of the Bank charter, was a valid obligation on the State, protected from impairment by the Federal Constitution, would be to hold, that the Constitution protected a contract which bound the State to guarantee the payment of taxes raised to sustain a government in open hostility to the Federal Constitution and the Federal Union. It follows necessarily,

that the usurping government did not and could not commit the State to a contract, which should continue any longer than the usurping government itself continued, and such contract could not be under the protection of the Federal Constitution. Although the notes issued by the Bank might be binding, as between the Bankand the holders thereof, they could not be made the basis of a contract between the State and the holders thereof, by which the State would be bound to receive them for taxes due the State, after the usurped government should cease to exist, and the legitimate government be restored. It follows that because the contract arising under the 12th section of the Bank charter, during the existence of the usurped State government, was not under the protection of the Federal Constitution, it was competent for the Legislature of the restored State government, to repudiate the alleged contract, and refuse to receive the notes in payment of taxes assessed to support the restored egitimate government. The legislature of the usurping government had no power, by re-enacting the 12th section of the Bank charter, to impose upon the State an obligation which the Legislature of the restored legitimate State government would be bound to carry out. It follows that there was no error in the refusal of the court below to grant a peremptory *mandamus*.

JAMES GLASGOW v. THE STATE.

1. CRIMINAL LAW. *Ministerial acts. When not invalid.* An indictment for a felony against a party, the filing of a plea of "not guilty" thereto, and the order of the judge to spread the indictment upon the minutes of the court, are mere ministerial acts, in no wise affecting the interest of the accused. Such proceedings are therefore not invalid because had while a judge was presiding, incompetent to sit upon the trial of the cause.

2. SAME. *Failure to spread indictment upon minutes does not invalidate the cause.* Nor does the omission to have spread the indictment upon the minutes of the court either enlarge or diminish the rights of the accused, since the object of such a proceeding is simply to provide against the consequences of the loss, abstraction or destruction of the orignal.

3. SAME. *Appointment of special judges. Authority for must be strictly pursued. Consequences of omission so to do.* In the appointment or selection of special judges in criminal cases, the law authorizing it must be strictly pursued. Neither does the Constitution nor any statute of the State provide for the appointment of a special judge, in such a case, by the agreement of the parties. The verdict and judgment rendered, while a special judge so appointed was presiding, are therefore held void, the prisoner declared never to have been in jeopardy, and remanded for trial *de novo*.

FROM TROUSDALE.

Appeal from the Circuit Court at Hartsville. F. S. WILSON presiding.

No record can be found.

TURNEY, J., delivered the opinion of the court.

The prisoner was convicted of murder in the second degree, and has appealed to this court.

The objection that Hon. N. W. McConnell, Judge of the Fifth Judicial Circuit, and who had been employed to prosecute before his election, and before the finding of the indictment, was presiding when the indictment was found, and ordered it spread upon the minutes of the court, and was also presiding when the plea of not guilty was filed, is not well taken; these were mere ministerial acts in nowise affecting the interests of the prisoner or the merits of the case. The law directs, in plain and unequivocal terms, what should be done; that this was done, was recited by the clerk on the minutes of the court, verified by the signature of the Judge—a mere *formal* act, awarding no process, deciding no question.

The omission to have spread the indictment upon the minutes would in no way have enlarged or diminished the rights of the accused.

The policy of the government in requiring a spreading upon the minutes, is to provide against the consequences of the loss, abstraction or destruction of the original.

A more serious objection arises upon the following entry of record: "The regular judge, N. W. McConnell, being incompetent to try this cause, by reason of his being counsel in the cause, it was agreed by both the counsel for the State and the prisoner himself, that S. F. Wilson, a member of this bar, shall preside as special judge in the trial of this cause. Thereupon, N. W. McConnell retired from the bench and S. F. Wilson took the bench."

Was this proceeding regular and according to the laws of the State? We think not.

There is no provision of the Constitution nor act of the Legislature authorizing or directing the constitution of a court, or the the supply of a vacancy for incompetency or other cause, by the mode pursued in this case.

This was not an inferior court created by the Legislature, nor was it an election by the attorneys of the court, as allowed by ch. 78, sec. 1, of the act of 1870.

In the appointment or selection of special judges in criminal cases, the law authorizing it must be strictly pursued and observed. As already stated, there was no authority under the Constitution or by statute for the proceedings in this case.

The result is, the entire proceedings, verdict and judgment are nullities, leaving the case as if no trial whatever had been had. The prisoner was never in jeopardy, and is remanded for trial *de novo*.

WILLIAMS *et al. v.* DUCK RIVER VALLEY NARROW GAUGE R. R. CO. *et al.*

1. DUCK RIVER VALLEY NARROW GAUGE R. R. CHARTER. The Charter of the Duck River Valley Narrow Gauge Railroad discussed, and held valid except as to powers sought to be conferred by it, which are included in the charters granted by the Legislature to the Nashville and Decatur and Tennessee and Alabama Railroad Companies.

2. SAME. *Marshall county bonds.* The bonds issued by Marshall county in payment of her subscription to the capital stock of said company, held valid and binding on the county.

FROM MARSHALL.

Appeal from the Chancery Court at Lewisburg. ————, presiding.

CAMBELL, MCEWEN & BULLOCK for complainants.

LEWIS BROS. and T. M. JONES for defendants.

DEADERICK, C. J., delivered the opinion of the court.

The bill in this case was filed in Marshall county chancery court, by a large number of citizens of that county, who are tax payers, seeking perpetually to enjoin the collection of a tax levied to pay interest on bonds issued to said railroad company.

This company was organized, upon the petition of certain of the defendants, by the chancery court at Waverly, under the provisions of an act of 29th of

January, 1871, entitled, "An Act to authorize the chancery court to grant letters of incorporation." Upon a petition filed in the chancery court of Waverly, certain persons, therein named, were at June Term, 1871, by decree of said court, appointed commissioners for the purpose of taking the necessary preliminary steps, "to get subscriptions of stock towards constructing a railroad."

At November Term, 1872, a further decree was entered by the chancery court, reciting that a petition and amended petition had been filed, praying that the petitioners be incorporated by the style of Duck River Valley Narrow Gauge Railroad Company. The decree recites that the capital stock, to the amount of one hundred and fifty thousand dollars, had been subscribed towards building a narrow gauge from Johnsonville, Humphreys county, to Fayetteville, Lincoln county, Tennessee, the length of the railroad, including side-tracks, being about 130 miles, and the amount subscribed exceeding $1,000 per mile, which sum is all that is required by the amendment to the act of the 26th January, 1871, passed December 14, 1871, to authorize the chancery court to organize and form a company to build a narrow gauge railroad. After various recitals in the decree of the steps taken and acts done by the petitioners, the decree proceeds to organize the company with all the powers, &c., of the Tennessee and Alabama Railroad Company and Nashville and Decatur Railroad Company, and with all the rights, powers, &c., granted to railroad companies by the act

of the General Assembly, ch. 54, approved January 30th, 1871, and all amendments thereto.

Under the charter the company proceeded to obtain stock, and, upon their application, the county court of Marshall county submitted the question of subscribing $115,000 by the county to the stock of said company.

The people, at an election ordered and held, voted to take that amount of stock, and the bonds of the county were issued, and a large portion of them delivered to the company and expended in the construction of the road; several miles of the road were finished between Columbia and Lewisburg, and considerable grading was done, and other work completed and in progress, when in December, 1875, complainants filed their bill. Up to this time the taxes levied had been for several years paid. Admitting that the decree, organizing the company, is subject to criticism, yet it is manifest that the substantial purpose of that decree was to effect the organization of the company under the general powers conferred upon such corporations by the acts of the Legislature, and it appearing that the company had an organization under this charter, and had constructed a part of its road, and entered into contracts in the prosecution of its business, and was recognized, by the county court and tax-payers, as a subsisting organization, the validity and regularity of the proceedings by which the company was organized, will not be inquired into in this form of proceeding.

But we are of opinion that the charter is valid

as to all the powers conferred by the act of 1871, and the amendments thereto, but not as to any powers attempted to be conferred, which were included in the Nashville and Decatur and Tennessee and Alabama Railroad Company. Without reviewing in detail the proceedings incident to the subscription of stock by the county, we are of the opinion that no such irregularities occurred in the proceedings to that end as to invalidate the subscription. The record, though voluminous and made up in part of much irrelevant matter, has been examined carefully, and we are of opinion that the decree of the chancellor, dismissing complainants' bill, was correct, and it will be affirmed.

Cox *v.* Kent.

PLEADING AND PRACTICE. *Before Justices. Certiorari. Petition for. Mistake not sufficient to sustain.* Plaintiff, in a petition for certiorari to bring up cause from a justice of peace, alleged that he had a good defence to the action, but understood the case to be set for the 26th, when it was tried on the 19th, and that he did not discover his mistake until too late to appeal. Held not sufficient to support the petition.

Case cited: Copeland v. Cox.

FROM JACKSON.

Appeal from the Circuit Court at Gainsboro. Judge S. M. FITE presiding.

E. L. GARDENHIRE for Cox.

No counsel marked for defendant.

McFARLAND, J., delivered the opinion of the court.

The only question in this case is whether the petition for the writ of certiorari, to bring up the case from a justice of the peace, states sufficient reasons for not appealing. On this subject the petitioner says: "Petitioner told the officer, at the time the warrant was served on him and his securities, that he had a good defence against the recovery of said note, and was going to defend the suit and resist judgment, whereupon the officer said that in case any defence was to be made he was instructed to re-

turn the warrant before Esquire Armstead. Your petitioner was then summoned to answer the complaint and also his security. The trial was put off some time, and your petitioner thought Saturday, the 26th of this month, was the day of trial. He so understood the officer at the time, and never knew any better until yesterday, when he was informed that the warrant was returned before said justice on Saturday the 19th of this month, at which time judgment was rendered, and before petitioner was apprised of said mistake the time allowed for him to appeal had expired. Petitioner told said officer that he intended to appeal to court. He was advised by his counsel not to make his defence before the justice, but to appeal to the circuit ccourt and make it there. That he intended to go to Granville, where the justice lived, and appeal on the 28th of September, which would have been in time, but for the mistake; that he lost his right to appeal by no fault or negligence of his; that he could not help the misunderstanding as to the time."

So long as the rule is maintained of requiring the petitioner to show a reason for not appealing, before allowing the certiorari as a substitute for appeal, the reason for not appealing ought to be a substantial one, and show that the petitioner has been guilty of no culpable negligence and want of attention on his part. It is not the policy of the law to relieve parties from the consequence of their own culpable negligence. It has been said that as the jurisdiction of justice increases the strictness of the rule in this regard should be

relaxed, but still the rule cannot be abandoned altogether.

The petitioner does not state that the officer practiced any deception upon him as to the time, or that in fact that he made his return different from the truth, but simply that he misunderstood the officer as to the time of the trial. It is true mistakes often occur, but with the most ordinary care and attention to the matter the mistake could not have occurred.

Petitioner should have taken the care at the time to have known from the officer the day set for trial; this he could easily have done. Parties must be held to ordinary care and attention to their business. A mistake of this sort could be easily manufactured. In *Copeland* v. *Cox*, 5 Heiskell, Judge Deaderick said "Unless a party has been deprived of his right of appeal by inevitable accident, by the wrongful act of the justice or adverse party, or his own blameless misfortune, no matter how meritorious his case may be, he must be repelled from court." We are of opinion that the judgment of the circuit court judge, dismissing the case, is correct and should be affirmed.

MAYOR AND CITY COUNCIL OF NASHVILLE, in error, v. MARGARET HAGAN, Adm'x.

1. LIABILITY OF MUNICIPAL CORPORATION. *Power of Committee to bind corporation. Water-works. Improvement.* The power to make a contract for the introduction of a new and expensive improvement in a system of water-works, being equivalent in general to the power to levy, collect and disburse taxes, must be exercised in the same manner and by the same authority, that is, by a corporate act. There being no general law or ordinance modifying this rule, a water-works committee had no power to bind a corporation by a contract of this character.

2. SAME. *Same. Ratification of contract by city government.* The court below instructed the jury that the failure of the city authorities within a reasonable time to disaffirm what the committee had done, would be a ratification; and refused to charge, that the ratification could only be by the action of the two boards of Aldermen and Councilmen approved by the mayor, and that the mayor and members could not commit or estop the city by any conduct or expressions of the water-works: *Held*, error.

Case cited: The State v. Ward & Briggs. 9 Heisk., 100.

3. SAME. *Use of machine. Patent right.* The use of a patent machine does not necessarily imply, in the absence of a contract, that the patent is to be paid for.

FROM DAVIDSON.

No record can be found.

McFARLAND, J., delivered the opinion of the court.

This action was brought by John C. Hagan against the mayor and city council of Nashville. The declaration avers in substance that the plaintiff was the

inventor and exclusive owner of a new and useful machine for supplying cities and towns with water, and for extinguishing fires. That in 1869 he had filed his *caveat* in the patent office, and after the contract with the defendant he obtained letters patent. That after he had filed his *caveat* he entered into a contract with the defendant, by which he agreed to permit its officers and agents to have said machine manufactured, and put in operation under his (the plaintiff's) supervision, and to use and employ the same to supply the city of Nashville with water for the use of its citizens, and for the extinguishment of fires; and in consideration thereof the defendant promised and agreed that if upon trial the machine should be found capable of raising water to such a hight as the power of the engine at the water-works was capable of affording, and the strength of the pipes through the city was capable of resisting, it would pay the expense of manufacturing the machine, and, in addition, such reasonable compensation to the plaintiff as the use of said machine for supplying water, etc., was reasonably worth; and it is averred that the machine was accordingly manufactured and used by the city, and upon trial was found capable of raising water as high as the capacity of the engine and strength of the pipes would allow, and the city thereby became liable to pay the plaintiff what the use of said machine was reasonably worth, which is averred to be $50,000.

There is also a common count for work and labor done, materials furnished and goods and wares sold, etc.

The defendant pleaded a general denial of its promise and undertaking, and also that it had complied with all its covenants made with the plaintiff in respect to the matter alleged. Upon trial, there was verdict and judgment in favor of the plaintiff for $12,000. A new trial being refused, the city took a bill of exceptions and appealed in error to this court, and numerous errors have been assigned in argument as grounds for a reversal. There was no evidence that a formal contract was entered into between the plaintiff and the city authorities acting in a corporate capacity, or that any action was taken by either of the two boards constituting the city government, authorizing such contract, or having reference thereto. The plaintiffs introduced H. D. Grant and several other witnesses, by whom it was proven, in substance, that Grant was chairman of one of the standing committees known as the water works committee. That as such it became his duty to investigate the condition of the existing water works and the supply of water. Under the system then existing, the city was supplied by means of a reservoir, into which the water was forced from the river by pumps driven by steam, and from the reservoir the water was carried through pipes into the city by weight and pressure of the water in the reservoir. Grant found that this syster failed to supply certain high places in the city, and, in cases of fires, the supply of water was not sufficient in other places. Grant regarded it as his duty to devise some plan to remedy the defect. Several plans were proposed, discussed and rejected.

The plaintiff then presented his plan and satisfied Grant that it would be successful. He says, "consequently I recommended it to the mayor and city council, and secured an appropriation necessary for its construction. The understanding with the committee and mayor and city council was, that Hagan should be paid what his machine was worth, should it prove a success."

In explanation of this, which appears in the deposition of Grant, read by the plaintiff, the defendant read another informal deposition or affidavit given by Grant previously, in which he says: "The understanding with the mayor and a large majority of the members of both boads, *with whom I frequently talked about this matter*, was always clear and distinct, that that or any succeeding administration would do you (meaning Hagan) the justice to allow you what your machine was worth if you made it a success."

There was a large mass of other testimony, but nothing more definite as to the contract. There is proof that the other members of the committee assented to the action of Grant; but their understanding as to what was to be paid to Hagan was very indefinite. It fully appears that the machinery, constituting Hagan's improvement, was manufactured under a contract entered into between Grant, chairman of the water works committee, on behalf of the city, and J. M. Brennan & Bro., the manufacturers, under the supervision of Hagan, and that the price agreed upon was paid to the manufacturers by the city authorities.

Without attempting an accurate description of Hagan's improvement, it is sufficient to say, that it consisted of a large pipe laid down across the bottom of the reservoir, connecting directly the supply pipe from the pumps with the main pipe leading into the city, and into this was inserted certain valves, stand-pipe and air-chamber; the result of which, it was claimed, would be, when occasion required, to force the water directly from the pumps into the pipes leading through the city, and that this system would convey the water as high as the force of the engine and the strength of the pipes would allow; when there should be an excess of water over the supply demanded it would escape into the reservoir. The engine pumps, pipes and reservoir, and, in fact, everything, except the improvement above mentioned, were the same owned and used by the city under the old system. The improvement of Hagan was put down and a time fixed to test it; and the mayor, city council and citizens invited to test, some of whom were present and pronounced themselves satisfied with the improvement, and declared the improvement a success; and the proof shows that the flow of water was greatly increased in those portions of the city where there had been a deficiency. No action, however, was taken by the corporate authorities. Soon after there was a change of officers in the administration of the city government, and upon the new engineer coming in charge removed certain portions of the fixtures of Hagan's improvement. That is, as we understand, he removed the safety-valve—what is called the butterfly-

valve—and air chamber, but retained the main pipe and stand-pipe." It is claimed by the plaintiff, that the city is still in use of the material portions of his improvement; while for the defendant it is insisted, that the *combination*, covered by the plaintiff's patent, has been abandoned, and that the city had simply adopted a new combination, embracing parts of the plaintiff's combination, which were not in themselves *new* or covered by his patent, and is now using this new system. This is one of the controverted questions.

It is claimed for the defendant that it was necessary to abandon Hagan's combination, because the pumps and machinery were being badly injured by the excessive pressure. It was also claimed that Hagan had himself removed some parts of the fixtures to his improvement, and forbade their use, alleging that the city had refused to pay him. It was also alleged that the officers in charge proposed to allow Hagan to remove any of his machinery he claimed; but these were not controverted questions. This outline of the case will suffice to present the questions of law involved.

The first question was whether the water works committee had the power to bind the city government, by a contract of this character. We think unquestionably it had not. The power to make a contract of this character, for the introduction of a new and expensive improvement, is equivalent in its character to the power to levy, collect and disburse taxes, inasmuch as, if the contract be valid, it must be com-

plied with, and the price agreed to be paid must be raised by taxation, and paid out under the appropriations of the proper city government. The power to make such a contract, being equivalent in general to the power to levy and disburse taxes, must be exercised in the same manner and by the same authority, that is, by a corporate act. The city government may, by general laws and ordinances, modify this rule and give to the committees power to make contracts in some instances. Under the ordinances passed by the city government and read on the trial, it is expressly provided that the standing committees may recommend improvements involving the expenditure of money, but no money shall be paid out except under authority of the city council, or under existing laws; "Provided that the water works committee shall not be prevented in case of *emergency* from making all necessary expenditures to keep the water works in good repair and condition, and in active operation." It is clear, however, as we think, that this proviso gave no power to the water works committee to bind the city by contract for the introduction of a new system of water works, involving an expenditure of several thousand dollars. The power was, in case of *emergency*, to make expenditures to keep the existing water works in repair and in operation; but this was the introduction of a new system in part, involving a large expenditure. There was ample time, from its nature, to refer the matter to the council and it was therefore not a case of emergency.

The circuit judge was requested by the defendant's

counsel to instruct the jury that the water works committee could bind the city by contract, only in case of emergency in the sense of the ordinance read; and emergency meant something pressing and not admitting of such delay as would suffice to bring the matter before the council. This the court declined, but said that any contract the committee made for the purpose of supplying the city with water would be valid *prima facie*, as the committee were to judge of the necessity; that it might be shown, however, that they had transcended their power. How this was to be shown was not explained. As we have intimated, we think this was error. The jury should have been told that the committee could only contract for expenditures in case of emergency, for the purpose of keeping the water works in repair and in operation. That this did not give them the power to contract for the introduction of a new system involving a large expenditure. That this, from its very nature, was a matter to be referred to the city council. But this instruction and refusal of the defendant's request would not, of itself perhaps, be of so vital importance, for the reason that the judge in the charge did, in substance, tell the jury, that the committee had not the power to make the contract. He said: "If the proof does not show that the plaintiff had made the specific contract with the city council, but made it with the water works committee, and the proof shows that after the test was made and the water works committee expressed themselves satisfied with the result, it would then be necessary, in order

to make it binding on the corporation, that the mayor and city council should take some action upon the matter, and either reject or affirm it." He continues, however, "but if the proof should fail to show that there was any action by the mayor and city council disaffirming or affirming the contract, and it should appear that the mayor and city council had the knowledge of all the material facts in relation to the contract, and of the test of its results, and failed within a reasonable time to disaffirm what the committee had done in the matter, the court instructs you that this would be a ratification of the contract upon the part of the mayor and city council." In this connection his honor was asked to instruct the jury, that the ratification could only be by the action of the the two boards of aldermen and councilmen, approved by the mayor; and that the mayor and members of the council could not commit or estop the city by any conduct or expressions of theirs at the water works at any time. These instructions were refused. We hold that in the latter clause of the charge above given, and in the refusal his honor was in error.

We do not say that a ratification may not arise from the *corporate acts* of a city government which are inconsistent with any other supposition, although the contract was without authority and although there was no direct vote of ratification. This is illustrated by the case of *Paterson* v. *The Mayor and Council of New York,* 13 New York Court of Appeals, relied upon by plaintiff's counsel. In that case it apeared that the committee on markets had referred to them the sub-

ject of rebuilding the Washington market. One of the committee employed the plaintiff to draw very elaborate plans of the proposed buildings. The plans were afterwards adopted by the proper city authorities in due form, and the building ordered to be erected. This was held to amount to a ratification. It was conceded that the contract was without authority, that it would require a legislative act to make or ratify the contract. It will be observed that the ratification resulted from the action of the authority in adopting the plans of the plaintiff and taking the necessary steps to erect the building; but this was a corporate act, passed in due form by both chambers of the city government, as other ordinances or legislative acts were adopted. We think no well considered cases can be found holding that a contract of this character, which could only be made in the first instance by the act of the city authorities in their corporate capacity, can be ratified by the failure to take formal action repudiating the contract, notwithstanding members of the city council have knowledge of the facts. In the case of *The State* v. *Ward & Briggs*, before this court at December term, 1871, one of the questions was, whether certain portions of a contract for leasing or hiring out the convict labor of the penitentiary, in which the commissioners upon the part of the State had exceeded their authority, had been ratified by the Legislature. It was held, that as the commissioners acted under an act of the Legislature, that the ratification must have been by a legislative act. Chief Justice Nicholson, delivering the opinion of the court,

said: "It is not enough that the individual members of the Legislature should have had knowledge of the existence of the illegal stipulations in the contract, and should acquiesce passively therein; but to amount to a ratification, they must take some definite action as an organized Legislature, either expressly recognizing and adopting the illegal stipulations, or some definite action as a Legislature, from which an intention to ratify them may be fairly inferred." In support of this Judge Nicholson refers to 18 Maryland R., 282; and 20 Maryland R., 14; in which cases it was held that the ratification of unauthorized acts by municipal corporations must be by corporate acts; and to 16 California, 23, in which it is said: "To ratify is to give validity to the act of another. A ratification is equivalent to a previous authority, it operates upon the act ratified in the same manner as though the authority had been originally given." "It follows," continues the authority, "as a consequence, that where the authority can be originally conferred only in a particular form, the ratification must follow the same form or mode; . . . where an authority to do any particular act upon the part of a corporation can only be conferred by ordinance, a ratification of such act can only be by ordinance." Judge Nicholson adds, that "the reasons on which the rule rests, as to a corporation, apply with equal force to a Legislature, the corporation being in this repect a *quasi* Legislature."

It is argued, however, for the plaintiff, that, even conceding this error, the judgment should not be

reversed, because it is said the verdict was proper under the common count; but we cannot determine under which count the jury rendered their verdict, and cannot say that the error may not have prejudiced the defendant; and besides we will not now undertake to say, that the verdict was proper under the common count. We are referred to the case of the *Gas Company* v. *San Francisco*, 9 California. In that case it appeared that the gas company had furnished gas to the city under a contract, for which judgment was rendered without objection; and that, without any contract, the company furnished the city with gas, in addition, to light the city hall and engine houses for nearly two years; the bills, amounting to over $10,000, were rendered monthly to the common council, and a portion of them audited and allowed, but not paid; that the gas was used nightly in the chambers of the common council during its sittings, in the office of the mayor, comptroller, treasurer police officers, etc. The case was decided in favor of the right to recover, upon the ground that under the California statute the answer to the complaint was insufficient.

In the opinion of Judge Field, however, there are remarks which, although *obiter*, we are not disposed to controvert. He says: "The respondent denies the right, upon the sole ground that there was no evidence of any ordinance of the common council authorizing the furnishing of the gas. The proposition of the defendant is that a municipal corporation can incur no liability otherwise than by ordinance. The position to its full extent is not tenable; under

some circumstances a municipal corporation may become liable by implication; the obligation to do justice rests equally upon it as upon an individual. It cannot avail itself of the property or labor of a party, and screen itself from responsibility under the plea that it never passed an ordinance on the subject. As against an individual, the law implies a promise to pay, and the implication extends equally to corporations."

He further says that where the contract is executory the corporation cannot be bound unless made in pursuance of provisions of its charter; but where the contract is executed, and the corporation has enjoyed the benefit of the consideration, an assumpsit will be implied. It will be presumed, for the purpose of justice, that authority was properly delegated to the officers, or that their acts were ratified;" conceding that these remarks were proper as applicable to a case like the one then before the court, and not deciding whether it be in conflict with the opinion of this court in the case of Ward & Briggs, they certainly do no apply with the same force to the present case. Where property is delivered and used, as in that case, the clear and necessary inference, as well as the natural sense of justice, would be that it was to be paid for; but here the property itself, that is, the machinery was paid for by the city. The plaintiff does not sue for his labor in superintending the building, but for the value of his right patented. While the delivery and use of property would ordinarily raise an inplication that it was to be paid for, the use by the defendant

of a machine for which it had paid, would not necessarily raise an implication that it was to pay for the patent right. The plaintiff might, in such cases, permit the building and use of such patented machine by the defendant at its own expense, as a means of testing an untried improvement and advertising it to others; whether in such cases the patentee is to have pay for his patent would depend upon his contract. If he should permit an individual to build, at his own expense, and use such patented machine, without any contract that he was to have pay for the patented right, he would be without remedy, and the same rule would apply to a corporation.

Whether there might be in such cases grounds for a court of equity enjoining the use of such machine, where the permission was given under a misapprehension or the belief that the contract for pay was valid, we need not decide. We only hold that the use of such patented machine does not necessarily imply, in the absence of a contract, that the right is to be paid for; and we, of course, do not decide that the improvement that the defendant continued to use, is in substance the improvement covered by the plaintiff's patent.

The judgment must be reversed and a new trial granted.

WESTERN UNION TELEGRAPH CO. v. THE STATE OF TENNESSEE AND COUNTY OF SUMNER.

TELEGRAPH LINES. *Taxable.* Telegraph lines are considered as partaking of the nature of realty, in analogy to the new doctrine that railroads and rolling stock are so treated, and consequently under the act of March 24, 1875, such property is held by the court liable to State and county tax, notwithstanding it also pays a privilege tax.

FROM SUMNER.

Appeal from the Circuit Court at Gallatin. Judge J. C. GUILD, presiding.

W. S. MUNDAY for plaintiff in error.

No counsel marked for defendant in error.

McFARLAND, J., delivered the opinion of the court.

The only question in this case is, whether the line of telegraph owned by plaintiff in error is subject to State and county taxes, as other property in the county of Sumner. The general question to be decided will be as to whether telegraph lines, as property, are now subject to taxation under our laws, this particular case being brought, as we understand, to test the question.

By the Constitution of 1870, art 2, sec. 28, all property, real, personal or mixed, shall be taxed; but the Legislature may except such as may be held by

the State, by counties, cities or towns, and used exclusively for public or private corporation purposes, and such as may be held for purely religous, charitable, scientific, literary or educational purposes, also $1,000 worth of personal property in the hands of each tax-payer. etc. It is ordered, all property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State." By the act of March 24, 1875, it is enacted in pursuance of the imperative mandate to the Legislature, that all property shall be taxed, with the exception laid down in the Constitution specified. By the Constitution, and this law, all property with the exceptions specified, is to be taxed. It is however to be taxed according to its value, that to be ascertained in such manner as the Legislature shall direct, so that the taxes shall be equal and uniform throughout the State. The only question then is, does the system, under which the value of our property is to be ascertained, furnish the means of ascertaining the value of a telegraph line, running through a county? if so, then its taxation follows as a matter of course. It is property; it has a local *situs*, which may be readily ascertained, so far as the line is concerned, is affixed to the soil, and its cost and value may be readily ascertained, we think, with approximate certainty, sufficient for all practical purposes of taxation, absolute certainty in value and equality being a thing probably unattainable by any system.

We treat the telegraph line as partaking of the nature of realty, in analogy to the now settled doctrine that railroads and rolling stock necessary to their use, running alone on their tracks, are so treated. We are aware that this is not strictly within the definitions of realty, as found in the ancient common law, but those definitions were formed in a ruder age than this, and must be accomodated to the advance of the age by sound analogies, as demanded by the exigencies of our diversified development; with this assumption, we look to the act of 1875, March 23d, providing for the assessment and collection of revenue, to see if this property may fairly be assessed and its value ascertained for taxation. It is there provided for the election of a tax assessor to assess and list all the real estate in his county. He is, by the second section of the act, to prepare a list of all taxable real estate in each civil district or ward of his county, then select in each district, with taxable realty worth less than $200 by last assessment, two reputable, prudent and discreet freeholders, residents therein, who, being sworn impartially to perform their duties, in connection with himself, are to assess and value all such property, and prepare a list of the same." Other provisions regulating the details of the proceeding need not be noticed.

We think it clear that all this may be done as to a telegraph line, as well as any other property, locally situated in each civil district, including instruments, etc., attached to and making up a part of a complete line of telegraph fitted for use as such. We

can see no need for the Legislature providing any special or arbitrary mode for ascertaining how such property shall be assessed. Nor would it be proper to affix any arbitrary valuations upon it. Its real value is to be ascertained as other property, and is taxed upon the same principle. In fact, to fix any arbitrary mode for assessing or ascertaining the value of property of the kind would not be in accord with the spirit of the Constitution, as probably tending to make an arbitrary result, not the real one, that is, the true value of the property, which is what was designed by the Constitution. The same principle applies to former modes of assessment before the act of 1875, here referred to, the particular mode of ascertaining the value by a general assessor and freeholders, being the only essential difference. We think this the best solution of this ques-tion. We cannot assume the Legislature have failed to obey the mandate of the Constitution, requiring all property to be taxed, if what they have enacted may be made to reach the end designated. We think we have shown that our law may be strictly pursued, and this property onerated with its fair share of the burdens of government. We find no exceptions in its favor—none, in fact, is authorized by the Constitution, or by the act of 1875. We do not feel called on to make one in favor of this corporation, unless compelled by law so to do. We think no such compulsion exists. This company, as others do, pays a privilege tax, on privilege of telegraphing, of four mills on every $100 in gross receipts, by the act of 1871. This, however, cannot affect the liability of the property

owned by the company to taxation as property. The privilege is one thing, the property owned by the party having the privilege another, each of which may be taxed, the one as privilege the other as property, according to its value, as provided by the Constitution. We therefore conclude this property is subject to taxation as such. As to the privilege tax, we need not examine the liability of the company to its payment, as it is not in question in this case.

Nor do we deem it necessary to examine the statute to see if the county judge has pursued precisely the proper mode of assessing this property in this case; we settle the principle, and the details can be adjusted by counsel in the judgment.

Affirm the judgment.

McFARLAND, J: I do not concur. I think the Legislature has failed to take necessary steps to authorize the collection of the tax.

A. LITTON *et al. v.* W. B. ARMSTEAD *et al.*

1. CHANCERY PRACTICE. *When bill should be rejected.* Though it should be regular and proper to sign a bill upon its face, still the same should not be dismissed for the mere irregularity of having been signed only on the back, such error being easily cured by signing under the direction of the court.

2. SAME. *Same. Bill not to be dismissed. When.* Serving a defendant with *alias* subpœna to answer, issued after the lapse of several terms, is not a good ground for discontinuance of a bill in equity, though it is of a suit at law.

FROM ————

No record can be found.

DEADERICK, C. J., delivered the opinion of the court.

This bill was dismissed on motion, or discontinued, for two reasons set forth in the order dismissing it:

1. It was not signed by counsel or by complainants.

It appears that on the back of the bill is written the name of A. A. Swope, solicitor, etc. The purpose of the signing of the bills by counsel, is, "to secure regularity, relevancy and decency" in allegations, and "responsibility and guaranty of his counsel," and a signing on the back has been held a sufficient compliance with the rule. Sto. Eq., pl. sec. 47. But it is more regular and proper that the signature of

the solicitor should be upon the face of the bill. The bill, however, should not have been dismissed for such irregularity, which could easily have been cured by signing under the direction of the court.

2. That for several terms of the court, after the issuance of the subpœna to answer, which was returned not executed, no other process was issued to bring one of the defendants into court. As to some of the defendants, who were non-residents, publication had been duly ordered, and subpœna to answer issued for another. After the service of this last subpœna to answer, the notice was entered to discontinue because of the chasm in the process.

This is a good ground of discontinuance at law, but not as to a bill in equity.

It was error to dismiss the bill, for the reasons stated in the decree, and the same will be reversed and the cause remanded for further proceedings.

96 516
110 217

FANNIE C. WILLIAMS, BY NEXT FRIEND v. ELEANOR H. CARSON *et al.*

INSURANCE, LIFE. *Assignment of policy. During husband's life.* A husband who has taken out a policy of insurance on his own life, payable in the usual form to him, his executors, administrators and assigns may dispose of the same by will. The provisions of the Code, secs. 2294 and 2478, directing that such a policy shall survive to the benefit of the widow and children, and shall not be subject to the debts of the husband, only apply when the policy remains undisposed of by the husband in his life time.

Case cited: Rison *v.* Wilkerson. 3 Sneed, 569.

Code cited: Sections 2294, 2478.

FROM DAVIDSON.

Appeal from the Chancery Court at Nashville. HON. W. F. COOPER, presiding.

SHACKELFORD & BRYAN for complainant.

R. MCPHAIL SMITH for defendants.

FREEMAN, J., delivered the opinion of the court.

This bill was demurred to in the court below, the demurrer sustained and the bill dismissed. The only question presented in the case is, whether a father, who has affected a life insurance on his own life, can dispose of the same by will, so as to defeat the claim of his widow and children, under sections 2294 and 2478 of the Code. These provide, the first, that "a life insurance, effected by a husband on his life,

shall inure to the benefit of the widow and next of kin, to be distributed, as personal property, free from the claims of creditors. The other section is, "any life insurance, effected by a husband on his own life, shall, in case of death, inure to the benefit of his wife and children, and the money arising shall be divided between them, according to the law of distributions, without being in any manner subject to the debts of the husband, whether by attachment, execution or otherwise." These two sections, the one found in our Code under title of Administration of Estates, and the other of Husband and Wife, are but the substance of the 3d section of the act of 1846, ch. 216, transferred into the Code. They were but intended to exclude creditors from reaching or appropriating the proceeds of such policies, and to provide for distribution between wife and children, but do not purport to nor intend in any way to interfere with the disposition of these policies by the husband in his life time, in any way he could change any other property.

This is the construction given to this very act by this court in the case of *Rison et al.* v. *Wilkerson & Co.*, 3 Sneed, 569, and which we hold to be unquestionably correct. The court say: "The wisdom and humanity of the law may be admitted, but surely it was not intended to divest the insured, while he lived, of the right of disposing of his own as he pleased, so as to bind those who might come after him and stand in his shoes." The court goes on to say, that the act only intended, and had no other object than

to prevent the fund from going into the hands of the administrator, preferring the widow and children to creditors. The principle thus announced is conclusive of the law. We think, as a matter of policy, it is the sounder view of the case, as it would tend to prevent husbands from thus investing their means, if they were thereby prevented from being able to dispose of them, with perfect freedom, either by ordinary transfer or by will, so as to meet the exigencies of business during life, or to adjust equitably the distribution of their property between wife and children after death by will.

Be this as it may, we are well satisfied to approve the principle announced in the above case and apply it to the case before us.

Affirm the decree below with costs.

HOWE MACHINE COMPANY *v.* JESSE CAGE, CLERK, ETC.

1. PEDDLERS. *Privilege tax. Sewing Machine.* Sec. 28 of art. 2, of the State Constitution, which ordains that "the Legislature shall have power to tax merchants, peddlers and privileges, in such manner as they may from time to time direct," and sec. 30 of art 2, ordaining that "no article manufactured of the produce of the State shall be taxed otherwise than to pay the inspection fees," are not repugnant to secs. 8 and 10 of the Constitution of the United States regulating commerce between the States.

2. SAME. *Same.* These two clauses must be construed *pari passu*, from which it appears that a distinction is drawn between a tax upon the article in specie, and the tax upon the privilege of peddling the article, and confers upon the Legislature a power to levy a tax upon the privilege.

3. SAME. *Same.* The acts of the assembly which enacts that "all peddlers of sewing machines, or peddlers selling by sample, must pay a tax of ten dollars," and that exempt articles manufactured of the produce of the State from taxation, are not in contravention of the provision of the Constitution of the United States authorizing Congress to regulate commerce between the States.

FROM SUMNER.

No record can be found.

TURNEY, J., delivered the opinion of the court.

The Constitution of the United States, sec. 8, ordains: "The Congress shall have power to regulate commerce with foreign nations, and among the several States, and among the Indian tribes." Sec. 10. "No State shall, without the consent of Congress, lay any imports, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imports, laid by any State on imports and exports, shall be for the use of the United States, and all such laws shall be subject to the revision and control of the Congress."

The Constitution of the State of Tennessee, art. 2, sec. 28, ordains: "The Legislature shall have power to tax merchants, peddlers and privileges, in such manner as they may from time to time direct." Sec.

30 of art. 2: "No article manufactured of the produce of this State shall be taxed otherwise than to pay inspection fees."

By an act of the general assembly of the State, passed March 13, 1868, entitled, "An Act to amend the revenue laws of this State," ch. 79, sec. 4, subsec. 10, it is provided, "all pedlers of sewing machines or selling by sample shall pay a tax of ten dollars." By a late statute the tax is increased to fifteen dollars.

By an act passed March 25, 1875, "articles manufactured of the produce of the State are exempt from taxation." The plaintiff in error manufactures its machines at Bridgeport, Connecticut, and have their principle office in Tennessee at Nashville. It paid its tax for 1876, for peddling in Sumner county, under protest, etc., and brings this action to recover back the amount so paid.

It is urged that some of these provisions of the State Constitution, and of the several acts, are repugnant to the Constitution of the United States, and therefore void. To support this theory, the case of *Welton* v. *State of Missouri* is cited. In that case the statute questioned, declares that "whoever deals in the sale of goods, wares, or merchandise, except books, charts, maps and stationary, which are not the growth, produce or manufacture of the State, by going from place to place to sell the same, shall be deemed a peddler," and then enacts that no person shall deal as a peddler without license, etc. It is obvious that this statute aims directly at the importation and peddling of goods in the

State, and is confined to these objects, discriminating between the citizen and non resident.

Our Statute is comprehensive and applies to the resident as well as the non-resident—to home manufacturers as well as to the importer of foreign goods or goods manufactured out of and not of the growth or produce of the State; it is not an attempt to regulate commerce between the State of Tennessee and a sister state. Nor is it an attempt to lay imposts or duties on imports or exports, but broadly levies a tax upon all peddlers of sewing machines without regard to place of growth, or produce of material, or of manufacture.

Again, while our Constitution ordains that no article manufactured of the produce of the State shall be taxed otherwise than to pay inspection fees, it also ordains, as we have already noticed, that the Legislature shall have power to tax merchants, peddlers and privileges," etc.

The two clauses must be construed *pari passu* and effect given to each. Construing them together it clearly appears the convention took and expressed a distincttion between a tax upon the article in specie, and a tax upon the *privilege* of *peddling* the article, and conferred upon the Legislature the power of enabling the enforcement of such distinction. These clauses of our State Constitution and the unrestrictive words of the statutes make a wholly different case to that of Welton, with which the judgment of the circuit court is not in conflict and will be affirmed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY AND NASHVILLE, CHATTANOOGA & ST. LOUIS RAILROAD COMPANY v. THE STATE OF TENNESSEE.

1. CORPORATIONS. *Railroads. Crossing streets with connecting lines. Nuisance. Eminent domain. Secs.* 1119, 1118 *and* 1120 *of the Code Construed.* Sec. 1118 of the Code provides that "all the railroads of the State have power to construct their roads so as to cross each other, if necessary, by the main tracks or branches, or to unite with each other as with branches." *Held*, that the plain meaning of this section, read by the light of secs. 1118 and 1120, was that various roads might form a homogeneous system, and that these roads, or any future roads, might unite by building tracks from one to the other for the purpose of transporting loaded cars.

Code cited: Secs. 1119, 1118, 1120.

2. SAME. *Same. Power of railroad companies.* This power being conferred on corporations which had built, or were empowered to construct railroads, and had already the power, in so doing, to exercise the right of eminent domain, and to purchase land for the purposes of the track, needed no additional power to be conferred in order to carry out the objects of the Legislature.

3. SAME. *Same. Necessity of sec.* 1119. It was necessary to authorize them to build further in order make to the connections contemplated, but they possessed the power already to carry out the work authorized.

Code cited: Sec. 1119.

FROM DAVIDSON.

Appeal from the Criminal Court at Nashville. T. N. FRAZIER, J.

SMITH, BAXTER & ALLISON and EAST & FOGG for Railroad Companies.

DEMOSS & MALONE for the State.

FREEMAN, J., delivered the opinion of the court.

This is an indictment containing several counts, only one of which need be noticed, that is the first, as the jury acquitted the defendants on the other counts.

This count is for obstructing Cedar street, by the erection of a trestle across the same for the passage of trains from the Louisville depot, on College street, to the depot of the Nasville, Chattanooga & St. Louis road, at the end of Church street. His honor, the criminal Judge, charged the jury, that, by the charters of the roads, they were not authorized to build this connection. We need not at present examine this question. He then proceeded to construe the Code, sec. 1119, and charged the jury that the companies would have the right to connect their roads by rail, under this section, so that they could pass trains, from one to the other, *provided* they made such connection on their own ground, and provided they did not obstruct, cross or interfere with the rights of the public, in connecting or uniting said roads, by running over or across ancient public streets or highways. He then tells the jury they must convict, if the trestle was made over such street or highway, and it thereby rendered less safe and convenient to travelers on the street or highway than before. The plain purport of the charge is, that the parties had no right, under the Code, to cross the highway with their track in order to make the connection.

The question on which the case must turn here, is, was this a correct statement of the law? for un-

der it the jury were bound to find the verdict they have given.

The section 1119, referred to, is as follows: "All the railroads of the State have power to construct their roads so as to cross each other, if necessary, by the main trunk or branches, or to unite with each other as with branches.

Secs. 1118 and 1120 throw light on the general policy embodied in the act of 1852, from which these three sections are taken. The first section is, "The guage of all the roads in the State, except those connecting with railroads of other States, of different gauge, is required to be five feet." The other section provides that, "every railroad company, when required, shall receive on its road and branches the full loaded freight cars of all other companies, transport them to their destination, and return them, without charging for the transportation of the goods, wares, and merchandise, or produce therein, a greater rate of freight than they charge for similar transportation in their own cars." The plain, unmistakable purport of this is, that they might form a homogeneous system, the cars of every road being adapted in gauge to the track of every other road. Then the provision that they might unite with each other, is but to carry out this idea, for it would be useless to require them to be of the same gauge, if they were not to be connected. Without connection, the one with the other, they might all have been of different gauge, so far as furnishing facilities for passing cars from one to the other was concerned. They could only be thus passed

by means of the connecting line of track for the purpose. The last provision was intended to regulate the freights to be charged on cars thus passed from one road to the other, and compell the roads, created by this act or expected to grow out of it, to act liberally and justly in the matter, so as to encourage such connections as were contemplated, and thus give our people the largest railroad facilities at least expense.

In addition ot this, the State was interested in increasing the trade and travel on these roads, having by this act provided for a large advance of the State credit for the benefit of the roads contemplated. It needed no great foresight to see, that if the freight, say at Nashville, destined to pass south, had to break bulk and be carried in drays and wagons from one to the other, competing lines in adjoining States, where such a state of things did not exist, would very soon have all such freight and reap its profits.

These considerations make it evident that the Legislature intended and empowered these roads, or any future roads, to unite by building tracks from one to the other for the passage of their loaded cars. This power being conferred on corporations, which had built, or were empowered to construct railroads, and had already the power in so doing, to exercise the right of eminent domain, and to purchase land for the purposes of the track needed no additional power to be conferred in order to carry out the objects of the Legislature. The corporations had already the necessary power for this purpose, as far as they were authorized to build roads. It was only necessary to

authorize them to build farther in order to make the connections contemplated, and they possessed the power already to carry out the work authorized. We do not think this question is one that admits of doubt, or requires an extended discussion or reference to authority or descisions of other courts to sustain so obvious a proposition.

We need not discuss the question as to whether this trestle has been constructed in the best manner to avoid unnecessary obstruction or travel on the street or highway. Suffice it to say, that his honor's charge was based on the idea of a right, which, under the circumstances, it would be impossible to enjoy, as it was, and had been for many years, impossible to pass from the Louisville road without crossing a street or highway.

Without further discussion, let the case be reversed and remanded for a new trial.

JOHN GUTHRIE *v.* THOMAS HOLT.

SALE OF LAND. *Verbal contract. Improvements.* When a vendor of land by verbal sale, puts the vendee in possession, and the vendee occupies and uses the land for a time, and then abandons the contract and refuses to take the land, in suit by the vendor against the vendee for use and occupation (the vendor being in no default), the vendee will not be allowed to set off the value of improvements, made by him while in possession, against the vendor's claim for use and occupation.

Cases cited: Humphreys *v.* Hottainger, 3 Sneed, 228; Merritt *v.* Parks, 6 Hum., 324; Wilkins *v.* May, 3 Head, 173; Raines *v.* Huddleston, 4 Heis., 323; Henning & Bird *v.* Palland, 4 Heis., 362.

FROM DAVIDSON.

Appeal from the Circuit Court at Nashville. Judge NATHANIEL BAXTER presiding.

F. E. WILLIAMS for plaintiff.

BAXTER SMITH for defendant.

DEADERICK, C. J., delivered the opinion of the court.

Holt obtained judgment in the circuit court of Davidson county against Guthrie, from which Guthrie appealed to this court. In January, 1871, Holt sold to Guthrie by verbal contract a tract of land in said county, agreeing to make him a deed when the boundaries should be ascertained. Holt put his son-in-law in immediate possession. Within the year Guthrie stated his inability to pay for the land, and proposed

to rescind the trade and pay for the use. This was not done, and Holt assumed possession, and sued him for rent for use and occupation.

The defences set up were, that Lovell, the son-in-law of Guthrie, was the purchaser and not Guthrie, and that he had made improvements on the land exceeding in value the rents. The jury found, on sufficient evidence, that Guthrie was the purchaser, and, under the charge of the court, they made no allowance for any improvements, but gave a verdict for $150 for one year's rent, of which plaintiff remitted $25.

The court charged the jury that if Holt was in fault in not completing the contract of sale, Guthrie would be entitled, upon plea of set off, to so much as his improvements enhanced the value of the lands, but if Holt was ready to carry out the contract and Guthrie refused, then he would not be entitled to any allowance for improvements. It is insisted by plaintiff in error that the entire part of this charge is erroneous, and that Guthrie or Lovell having purchased in good faith, and no deed having been executed, he is entitled, upon the repudiation of the contract by either party, to be allowed for improvements to the extent such improvements may have enhanced the value of the land.

The case of *Humphreys* v. *Hottsinger*, 3 Sneed, 228, is cited as sustaining the position contended for. In that case Humphreys was in possession under a title bond, which stipulated that if the contract was not met in twelve months after it is due, the same is subject to be reversed at the will of Hottsinger.

The purchase not having been paid for twelve months after it was due, Hottsinger elected to annul the contract and took possession of the property.

Humphreys filed his bill to obtain payment for his improvements. This court held, citing several cases, that the complainant was in possession lawfully by contract, and expected to pay for the lot, but was unable to do so. and, upon rescision, was entitled to be paid whatever sum his improvement enhanced the value of the lot, but no more. One of the cases cited is *Herring & Bird* v. *Pollard*, 4 Hum., 362, where the purchasers filed their bill to obtain restitution of sums paid upon a verbal contract of purchaser of land, and for compensation for improvements made thereon, upon their failure to agree with the vendor upon the character of the conveyance to be made, and the court said the question is whether a party who has made improvements upon the land of another, expecting to obtain the title, is entitled to payment and can enforce it in equity; and adopt the opinion of Judge Story, in 1 Story's Rep., 478, that the denial of all compensation to such *bona fide* purchaser, in such a case where he had enhanced the permanent value of the estate, would be contrary to the first principles of equity, adding that to me it seems manifestly unjust and inequitable thus to appropriate to one man the property of another, who is in no default. In this last mentioned case, as in the case in 3 Sneed, relief was sought in equity by the vendee. In 6 Hum., 324, it was held that a vendee in possession under a verbal contract of purchase

of land, could not recover at law for improvements, although he might do so in equity to the extent that such improvement has enhanced the value of the and.

And in 3 Head, 178, it was held as settled in this State that when a man is put in possession of land by the owner upon a verbal sale, or one otherwise invalid, which the owner of the land fails or refuses to complete, and, in expectation of the performance of the contract, the vendee makes improvements, he may recover, upon bill filed by him, the value of such improvements to the extent they have enhanced the value of the land, citing 4 Hum. and 3 Sneed cases. In the later case of *Raines* v. *Huddleston*, 4 Heis., 224, where there was a verbal sale with a promise by the vendee to pay $500 on taking possession, and the vendor then to give a bond for title. Raines, the vendee, took possession but did not pay any part of the purchase money, and Huddleston refused to make him a title bond, but told him he would give him further time until the next Christmas to pay what was dew then by the terms of their contract. Raines continued in possession, paid no part of the purchase money, and, after it was all due, abandoned the place and sued in chancery for the value of his improvements.

It further apppeared that at the time of the sale the vendor notified the vendee not to improve the land, if he failed to pay the $500 first due, as he would not allow anything for improvements.

Judge Nicholson, in delivering the opinion of the

court, referring to and citing the several cases decided by this court and other authorities upon this question, says:

"It follows, from the several authorities referred to, that complainant who comes into a court and claims compensation for improvements made upon the land of another, will be repelled unless he shows that he was a *bona fide* possessor holding under an invalid or verbal sale, and honestly believing that he has or will have a valid title, and intending honestly to consummate his purchase by the payment of the purchase money, and, while so holding, makes improvements which add to the permanant value of the land, but fails to consummate his purchase without fault on his part, and on account of the default of the vendor. Before he can successfully invoke the aid of a chancellor, it is incumbent on him to show that he has been in no default in not executing his contract, but has been prevented from so doing by the failure or refusal of the owner of the land to complete the sale."

Although it appears that the vendor had notified the vendee that he would not pay for improvements, the case is distinctly put upon the ground that the vendor was guilty of no fault, as by refusing to complete the sale or otherwise, but that the vendee was in default by his failure to perform his contract, and upon this ground, which is stated by the learned judge to be the rule deduced from the authorities cited, relief was refused, and we think the rule a sound one.

The case in Story's Rep. which was followed by the case in 4 Hum., assumed that the vendee was in no default and upon that ground was entitled to relief, and our own cases grant the relief upon the same idea, that the vendor either fails or refuses to complete the sale, or that by reason of an honest disagreement as to its terms, neither is willing to its execution upon the terms insisted upon by the other. In the case of *Humphreys* v. *Hottsinger*, 3 Sneed, 228, the learned Judge who delivered the opinion, after citing the previously decided cases by the court, already referred to, states that the case, although differing in its facts, falls within the principle settled in the cases cited.

If it is assumed that the vendor was in fault then the case would fall within the principle of those cases. But the vendor was ready to perform the contract, and the vendee failed or refused to perform his contract, and the vendor for this had the legal right to treat the sale as invalid, and one which the vendee had refused and failed to execute and complete. Under the rule laid down in 4 Heis., as deduced from the cases cited, the vendee would not be entitled to compensation for improvements.

We do not think that there was any error in allowing evidence to show what the place produced in 1873, which could have prejudiced defendant.

There was much evidence as to the value of the rent, and whatever tended to show the productiveness of the land would be relevant. Nor was there anything in affidavits introduced for a new trial. The

facts deposed to were considered leading points on the trial, and evidence adduced thereto by each party. Upon the whole we think there is no material error in the record and the judgment is affirmed.

G. GUGGENHEIM v. A. G. ROSENFELD AND S. LANDSBERGER.

1. PRINCIPAL AND SURETY. *Set-off. Bills and notes.* In an action against principal and surety, a debt due to the principal alone, may be set-off against the plaintiff's suit.

2. CONTRACT. *Evidence. Statute of frauds.* It will be competent to seek to establish plaintiff's contract, to be responsible to his principal for goods credited by him as a clerk, by evidence showing that other clerks had entered into a similar obligation, and had actually paid for articles so sold. Such a contract if made is not in violation of the statute of frauds by the clerk becoming responsible for the debts of an other, under the conditions of the contract.

FROM RUTHERFORD.

Appeal from the Circuit Court of Rutherford county. W. H. WILLIAMS, J.

C. A. SHEAFE and B. L. RIDLEY for plaintiff.

RIDLEY & RIDLEY and H. P. KEEBLE for defendant.

DEADERICK, C. J., delivered the opinion of the court.

The Plaintiff brought his action on a promisory note (alleged to be wrongfully in the possession of Rosenfeld), in the circuit court of Rutherford county. Defendant Rosenfeld put in several pleas, amongst them a plea of set-off. This plea alleges in substance that he had employed plaintiff as a clerk in his store with an express agreement, that he was to pay for any goods he sold upon credit without the consent of his employer, and that he had sold, contrary to his instructions, a large amount to insolvent parties, whereby the same was wholly lost, and set out the names of the parties to whom such sales were made and the amount of sales to each, and seeks to set-off the aggregate amount of said sales against the note sued on.

To this plea of set-off the plaintiff demurred and the demurrer was overruled. Plaintiff then replied to said plea, and there was a verdict in favor of plaintiff for the amount of the note and interest, and in favor of defendant on his plea of set-off for a larger amount, and judgment for the defendant by the court for the excess, from which plaintiff appealed. One ground of demurrer was that the plea of set-off seeks to charge plaintiff upon a promise to pay the debt of another in contravention of the statute of frauds.

The plea is in effect to charge plaintiff, on his own contract of assumpsit, to be liable for certain goods, sold without defendant's consent, and is not liable to the objection taken.

Another objection is, that the debts are not mutual, and therefore not the subject of set-off.

The note sued on was executed by defendant and one Landsberger as his surety, and the plea avers that defendant is principal and Landsberger is his surety only.

As a general rule, in an action against several joint debtors, they cannot set-off a demand in favor of one of them. But in an action against principal and surety, a debt due to the principal alone, it is said, has in some cases been allowed to be set-off. 2 Pars. on Con., 739, Note B, where a number of cases are cited.

In the brief of counsel for defendant, we are referred to Waterman on Set-off, secs. 237, 238, as holding the same doctrine, and quoting Lord Eldon as saying, in such a case, the joint debt was nothing more than a security for a separate debt. "The principal is primarily bound to pay the debt, and sec. 2923, under the title of set-off," provides, where there are several defendants, the verdicts and judgments shall be moulded according to the facts, and to meet the exigencies of the case.

There are grounds demurrer which we need not particularly discuss, as we are of opinion they were not well taken, and that the demurrer was properly overruled.

Several of the clerks in the store were allowed to testify on the trial, over the objection of the plaintiff's, that they had special instructions not to sell on credit, they would be responsible for the goods so sold.

Some of these clerks further testified, over plaintiff's objection, that they did sell on credit, and had to pay for goods the prices of which they failed to collect.

This evidence was improperly admitted, and was of a character to prejudice the plaintiff before the jury.

Upon this issue made between the parties, there was evidence *pro* and *con*, and it was not competent to establish plaintiff's contract, to be responsible for goods credited out by him, by evidence showing that other clerks had entered into similar obligations, and had actually paid for articles where they sold on credit and failed to collect the amount due for them.

The court also rejected the testimony of Guggenheim as to whether or not he sold goods to the parties named in the plea of set-off, upon the ground that there was but one replication to the plea read upon the trial, and that it was a special replication and admitted the sale of the goods to the parties named and their insolvency, and only denied he sold without the sanction of Rosenfeld.

The plea avers that it was agreed between plaintiff and defendant that plaintiff was not to sell goods to any person on credit without the sanction of defendant, etc. And defendant avers that plaintiff did, in violation of his agreement and without defendant's sanction, sell and deliver to insolvent persons, to-wit: on a credit to numerous parties, whose names are given, goods amounting in all to $1,100.

The replication denies the making of the contract, as set out in the plea, and adds, "nor did he sell any

goods to persons, in said defendant's plea set forth, on a credit without defendant's sanction," thus negativing the contract alleged in the plra, almost in the language of the pleas, and he also denies that he owes the defendant anything.

Although the language of the replication may be susceptible of the construction placed upon it by his honor, the circuit judge, as to its being a qualified denial, yet we are of opinion that by showing by the evidence that he did not sell at all, plaintiff would thereby support the material averment of his replication which negatives the averments of the plea, and we are therefore of opinion that it was error to reject the offered evidence.

For the errors indicated the judgment must be reversed.

SARAH C. NEWMAN, Adm'x, v. D. E. DAVENPORT.

1. AGENT. *A person appointed by the governor as receiver is. When. Contracts.* A person appointed by the Governor as receiver of a railroad, under the Internal Improvement acts, is a public agent, and not liable individually on contracts made as such, where he has not pledged his own credit.

Cases cited: Powell v. Finch, 5 Yer., 446; Enloe v. Hall, 1 Hum., 308; Amison v. Ewing, 2 Cold., 366.

2. ATTORNEY AND CLIENT. *Fees. Contracts.* Where the relation of attorney and client exists, the burden of proof is upon the attorney, to show that the services were rendered, and the compensation reasonable. He is not permitted to stipulate for a benefit incommensurate with the service to be performed.

Cases cited: McMahan v. Smith, 6 Heis., 167; Planters Bank v. Hornberger, 4 Cold., 531.

3. CONTRACTS AGAINST PUBLIC POLICY. All contracts for services to be rendered in influencing public officials to grant to particular persons control of business operations of the government, are void as against public policy.

FROM WILLIAMSON.

Appeal from the Chancery Court of Williamson county.

No record can be found.

MALONE, Sp. J., delivered the opinion of the court.

Sarah C. Newman, as administratrix of her deceased husband, T. W. Newman, seeks in this case to recover of the defendant, D. E. Davenport, certain sums of

money alleged to be due as compensation for professional services charged to have been rendered him by her intestate. Various items are set forth in complainant's bill, but all seem to have been abandoned by her except the four to be hereinafter noticed.

The chancellor was of opinion that complainant was entitled to recover for these four items, and decreed accordingly, but declined to allow interest. The defendant appealed from the entire decree, and the complainant from so much of it as refused to allow her interest

The first of these items is a claim for compensation for services as a lawyer rendered by the intestate to the defendant as receiver of the Winchester & Alabama railroad.

It appears that the defendant, Davenport, was appointed by the governor as receiver, in behalf of the State, under the Internal Improvement acts, of the Winchester & Alabama railroad, at a salary of $2,400 per annum, and that, as he admits, T. W. Newman was employed by him, but he insists that no service was expected to be, and, in fact, none was rendered him as an individual, that, as an officer of the State in charge of the railroad, he employed counsel when its interest seemed to demand it, just as he employed clerks, engineers or firemen, that it was well understood that no personal liability was incurred by him. He states that he agreed as receiver to pay T. W. Newman, as attorney for the road, $750 per annum. This is the sum claimed in the bill and shown by several witnesses to have been claimed by Newman.

But the superintendent of the road proves that he himself employed Newman at a salary of $125 per month, placed his name upon the pay-roll regularly in the monthly estimate, and supposes he was paid. He proves further that Newman was to look to the trust fund alone. No proof whatever is made of services rendered by Newman to Davenport individually in this conversation. Besides, it seems unreasonable that a man should agree to pay over one-fourth of his salary for legal advice alone.

The court are therefore of opinion that the proof shows that by the contract Davenport did not assume any personal liability, that this must have been understood by Newman. And it may be added, Davenport, as receiver, was a public agent, *Erwin* v. *Davenport*, 9 Heis. 44, and not liable individually on contracts made as such, unless he had pledged his own credit. Wharton on Agency, sec. 513, and cases cited; *Powell* v. *Finch*, 5 Yer., 446; *Enloe* v. *Hall*, 1 Hum., 303; *Amison* v. *Ewing*, 2 Cold., 366; *Parks* v. *Ross*, 11 Howard, 362.

The seecond item is a charge for compensation for services as attorney rendered to Davenport, as receiver of the Manchester & McMinnville railroad.

The defense set up by defendant is the same relied on as against the first item, and, for reasons already given, must be held valid.

The third contested item is for a claim for $5,000, charged in the bill in the following language: "For assisting in procuring for Davenport a contract for grading, bridge building, etc., on the Huntingdon branch

of the Nashville and Northwestern railroad, he agreed to pay complainants, intestate, the sum of $5,000, which is still due, the intestate having performed the service as agreed upon."

It is a little singular that there is no statement in the bill nor suggestion in the proof as to the character of the services, for which such large compensation is claimed.

There is nothing tending to show that T. W. Newman had skill or experience as a contractor, or that his credit was pledged or in any way relied on, and it is difficult to see what service he could render in procuring the contract, unless he could by his skill aid him in shaping his bid, or by his credit aid him in making a satisfactory bond. But the claim is for legal services. None such have been proved, and, in the absence of proof, the court do not perceive what services a lawyer, as such, could render in procuring a contract to build a railroad. The proof relied on to establish the contract, consists exclusively of admissions of Davenport, alleged to have been made to two brothers of the deceased. But Davenport, who answered under oath, denied that there was any such contract or employment.

At the time that the contract was awarded to Davenport, D. B. Cliffe was receiver for the State on the road, and John V. Gould was the engineer in charge. They both say that Newman never approached them with respect to the contract, that he had nothing to do with it so far as they knew, and that the contract was awarded to Davenport because his was

the lowest bid and the best one. Besides, it is established that the bid was made October 18, 1868, and was accepted October 19, 1868, and that T. W. Newman, after having been confined to his room by sickness for some three or four weeks, died at home, at or near Winchester, on the 2d of October, 1868, just fifteen days before the bid was made, and seventeen before the contract was awarded. Singularly enough, however, Davenport himself speaks of having mentioned to T. W. Newman that the contract was awarded to him.

But if the contract were established to the satisfaction of the court it would be difficult to maintain its validity. Cliffe was a public officer letting out a contract for the State. It was clearly for the public interest that he should be influenced alone by the responsibility of the bidder and the character of his bid, and extraneous influence, by which a particular bidder might gain an advantage, would result in harm to the public; any contract, therefore, for the exercise of such influence, must be clearly void, tending as it would to introduce personal solicitation and personal influence in the procurement of contracts, and thus directly leading to inefficiency in the public service, and to unnecessary expenditures of the public fund.

In *Tool Company* v. *Norris*, Mr. Justice Field, delivering the opinion of the court, said: "It is sufficient to observe generally, all agreements, for pecuniary considerations, to control the business operations of the government, are void as against public policy,

without reference to the question whether improper means are contemplated as void in their execution." 2 Wall., 56.

The fourth and last item contested, is a claim for compensation for services, stated in the bill as follows: "For assisting in procuring the contract to build the railroad from McMinnville to Sparta, which intestate did under special contract with him. Davenport agreed to pay him $5,000.

In his answer, which is under oath and responsive to the bill on this point, Davenport expressly denies any such contract. His deposition, however, is taken, and therein he asserts that his answer is true, and that he makes it a part of his deposition. But he says that "Col. Taze W. Newman was employed by me and assisted me in procuring the contract for building the Southwestern road from McMinnville to Sparta." Of course it is impossible to reconcile these statements. The answer to the interrogatories was written by a notary public, and a blunder may have intervened, or it may possibly be an instance of reckless swearing. The two brothers of the deceased prove that Davenport admitted to them the contract. But he in his deposition positively denies that he ever made any such admission.

It may perhaps be that Davenport intended to deny the special contract to pay $5,000, but to admit a retainer without stipulation as to compensation.

Jacob Brown states that he was himself interested with Davenport in the contract, that the bid was in fact put in by him in Davenport's name; that New-

man was not present at the time the bid was made, nor when the contract was let to Davenport; that he never heard of Newman in connection with it; that so far as he knew Newman did nothing to procure it, that there was nothing Newman could have done to procure it as a mere lawyer, and that witness himself wrote the contract under the supervision of the engineer.

Now there is nothing in the proof to show, nor do counsel in their argument suggest what possible legitimate service Newman could, as a lawyer, have rendered to entitle him to receive such a fee. There certainly is no proof that any service was rendered in procuring the contract. It is indeed suggested that Newman was exceedingly well posted in the "Internal Improvement acts," and on the probable ups and downs of State bonds—but inasmuch as the contractors were not paid, nor expected to be paid in bonds, the relevency of the suggestion is not very clearly perceived.

It appears that when this alleged contract was made, Newman was, and for some time previous, had been Davenport's counsel in a matter of importance. The question then comes to this: After the relation of attorney and client has been established, can the attorney make another contract with the client for further services and recover upon it, however clearly proven, without showing the nature of the services, how they were rendered, and the reasonableness of the compensation stipulated for? But this, if an open question anywhere, certainly is not in this State. It is quite

well established that in controversies between attorney and client, the law is severely exacting of the former, and applies rules much stricter than those which govern controversies between other parties. The onus is always upon the attorney to show that his contract is just and reasonable, and free from all exorbitancy of demand. He is not permitted to stipulate for a benefit incommensurate with the service to be performed. *McMahon* v. *Smith*, 6 Heis., 177. *Planters Bank* v. *Hornberger*, 4 Cold., 531. But he must show not only that the services were rendered, but that the compensation stipulated for was reasonable with reference to them.

If, then, it should be held that in this very doubtful case the weight of evidence as to the existence of the contract is in favor of the complainant, it must at the same time be held that she has failed not only to show that the compensation stipulated for was reasonable with reference to the services to be rendered, but even to show any services whatever were rendered.

The court are therefore of the opinion that the decree of the chancellor is erroneous and must be reversed, and the bill dismissed with costs.

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JAMES H. WILSON, Receiver, v. JAMES L. GAINES, Comptroller,

1. TAXATION. *Exemption. Corporation. Railroad. Charters.* The word "exemption" is not comprehended within the words "rights and privileges," as applied to a corporation claiming a right of exemption from taxation by virtue of a section of its charter, conferring upon it the *rights and privileges* of a like coporation, which latter corporation was by express terms of the charter exempt from taxation.

Cases cited: Mississippi & Tennessee Railroad v. The State, at Jackson; East Tennessee, Virginia & Georgia Railroad v. Hamblin county, at Knoxville; Constitution of the State, sec. 7, of art. 11; also, sec. 8, art. 11; Act of Legislature, December 11, 1845, sec. 38.

2. EXEMPTIONS FROM TAXATION. *Public policy.* Exemptions from taxation are contrary to public policy, and can only be allowed when granted in clear and unmistakable terms. If the language in which they are claimed to be granted leaves it doubtful, the benefit of the doubt must be given to the State, the life of which is taxes.

3. EXEMPTION FROM TAXATION NOT ASSIGNABLE. An exemption from taxation is personal to the corporation or individual possessing it, and is not assignable.

Case reviewed: Knoxville & Ohio Railroad Company v. Hicks, th volume.

FROM DAVIDSON.

Appeal from the Chancery Court. W. F. COOPER, Chancellor.

DEMOSS & MALONE for Wilson.

ATTORNEY-GENERAL for Gaines.

TURNEY, J., delivered the opinion of the court.

On the 11th of December, 1845, the Legislature chartered the Nashville and Chattanooga Railroad Company for the purpose of building a road from Nashville to Chattanooga. By sec. 38 of that charter, capital stock was forever exempted from taxation, and the road with its fixtures and appurtenances, including work shops, warehouses and vehicles for transportation, were exempted from taxation for twenty years from the completion of the road.

In 1852, the Legislature chartered the Edgefield and Kentucky Railroad, for the purpose of building a road from Nashville to the Kentucky State line. The road was completed in 1859. The road was run by the company, or a receiver for the State, until sold under the decrees of the chancery court, and has since been run by the purchasers, or their assigns, or a receiver.

Under sec. 6 of the act of February, 1852, the Edgefield and Kentucky Railroad Company was invested with all the powers and rights and privileges of the Nashville and Chattanooga Railroad Company, conferred by the act of December, 1845.

By sec. 2 of an act of assembly passed December 15, 1855, the charter of the Edgfield and Kentucky Railroad Company was so amended as to give it all the rights and privileges that were conferred on the Nashville and Southern railroad by an act of the General Assembly passed January, 1852. The Nashville and Southern railroad, by the last act referred to, was granted all the rights and powers and privileges, and subjected to all the liabilities and restrictions prescribed

by the charter of the Nashville and Chattanooga Railroad Company, and in the various amendments thereto, except as in the act further provided. In the act it is further provided by its 7th section, that the 13th section of the act of 1845 shall not be a part of this act. The 13th section referred to, provides that no other road shall be built, constructed or cut, nearer than twenty miles of the chartered one, etc.

The State extended it aid, under the general improvement laws, to the Edgefield and Kentucky road, and its sale was under a bill to foreclose the State's statutory lien upon the road, equipments, stock, etc. The road, its franchises, property rights, privileges etc., were sold, and were purchased by the county of Davidson and others, who subsequently sold it to the American Contract Company, which subsequently sold it to parties who put it into consolidation with various other roads, etc.,

On the 20th of March, 1875, the Legislature passed an act declaring the mode and manner of valuing the property of a railroad company for taxation, directing the assessments, providing proceeding in case of failure, etc. This latter act was amended in March, 1877.

The bill insists that the exemption is a privilege, that such privilege is a contract; that the exemption would continue, although the road should be consolidated with other roads; that the acts of 1875 and 1877 impair the contract between the State and the company, and prays that the comptroller be made a party defendant, that he be enjoined from collecting

the taxes or issuing a distress warrant, from certifying to the clerks of county courts, etc.

The first question, whether privilege is exemption from taxation, has been before us twice: The first time in the case of the *Miss. & Tenn. Railroad* v. *The State*, at Jackson, and then again in the case of the *E. T., Va. & Ga. Railroad* v. *Hamblin County*, in both of which we held, after full argument, that the term privilege did not include exemption, nor was it so intended by the Legislature in its use in any or either of the several acts referred to. However comprehensive a meaning may have been given to the term "privilege" by the courts of other States, or by Lexicographers, we are constrained to use it in the restricted sense and meaning given to it by our own laws and the Constitution of the State.

That it was not intended or understood to be sufficiently broad by the framers of the Constitution of 1834 to embrace exemptions, is made clear and indisputable by reference to sec. 7 of article 9 of that instrument by which it is ordained: "The Legislature shall have no power to pass any law granting to any individual or individuals, rights, privileges, immunities or exemptions, other than such as may," etc. A Legislature acting under this Constitution for its powers, and as defining its duties, must be conclusively presumed to have used a word or term of the Constitution in the sense and with the meaning given it by that Constitution.

The acts in review in this case, were passed while the Constitution of 1834 was in force and the

the supreme law of the State, the chart defining the powers and jurisdictions of the several departments of the government, and under which they were organized and moved and acted, and conformity to which determined the legality of their acts.

It cannot be pretended or presumed that the able men, comprising the convention which framed the Constitution, used language or terms without a purpose or meaning, or double terms of the same meaning without more.

We are satisfied the term "privileges," as employed in that Constitution, in the connection in which it appears, was used in its restrictive sense. That the interpretation we have given is the correct one, is made the more manifest by the use of the identically same language in sec. 8 of art. 11 of the Constiution of 1870, which shows the convention of that year understood the terms "privileges" and "exemptions" to perform distinct offices, and to have been employed with different meanings, the latter more comperhensive.

The act of the 11th of December, 1845, sec. 38, uses the word exempt. If the Legislature, in the acts incorporating the Edgefield and Kentucky road, had intended to have given it immunity from taxation, the natural way of so doing would have been in the use of the term exemption as suggested by the controlling word "exempt" in the section referred to. The use in the statutes of two only, of the words of the Constitution, i. e., "rights" and "privileges," and the omission to employ either of the other two following in immediate succession, viz: "immunities" and

"exemptions," either of which would have made clear the construction claimed by complainant, evidence a purposed intention on the part of the Legislature not to grant the benefit claimed by the bill, but, on the contrary, to reserve it for the advantage of the State.

Exemptions from taxation are contrary to public policy, and can only be granted in clear and unmistakable terms—they are not creatures of intendment or presumption. If the language in which they are claimed be granted leaves it doubtful, the benefit of the doubt must be given to the State, the life of which is taxes. In the case of *Humphreys* v. *Pigues*, 16 Wal., to which we are referred as authority against our conclusion in the former opinions of this court, the meaning of the term "privilege" is not discussed. A reading of the report shows clearly that it was in no way brought to the attention of the court, and was in fact not involved, so that while some of the reasoning, of the judge delivering the opinion, may seem to militate against the conclusion to which we have arrived, we must remember the discussion was of an entirely different question, and to sustain an entirely distinct conclusion, in no manner involving the meaning of the term "privilege."

The case of the *Knoxville & Ohio R. R. Co.* v. *Hicks* was predicated of the decrees of the chancery court at Nashville, this court holding that the decrees of the chancellor in that case were in pursuance of the act of the Legislature, and equivalent to a Legislative grant.

One other question remains: Would the present owners of the road or the complainants receiver be entitled to the exemption claimed, had it been expressly granted to the original company, or the term "privileges" as comprehensive as claimed? We think not. We have already mentioned the several sales and transfers of the road, its property, etc. For our determination of this question, we employ the language of Mr. Justice Fields, in *Morgan* v. *Louisiana*, 3 Otto.

Intendments will not be indulged to enlarge the operation of a clause restraining the exercise of a sovereign attributs of a State. As has often been said by this court, the whole community is intrusted in retaining the power undiminished, and has a right to insist that its abandonment shall not be presumed in any case where the deliberate purpose of the State to abandon it does not appear. Here is the capital stock of the company, and its works, fixtures, workshops, warehouses, vehicles of transportation, and appurtenances, which the statute declares shall be exempt, evidently meaning that it is the property of the company so long as it remains such, that the exemption shall apply."

The franchise of a railroad corporation are rights or privileges, which are essential to the operations of the corporation, and without which its road and works would be of little value, such as the franchises to run cars, to take tolls, to appropriate earth and ground for the bed of its road, or water for its engines, and the like.

They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal, and incapable of transfer without express statutory direction."

Dismiss the bill as decreed by the chancellor.

NELSON, Trustee, *v.* HOLLINS, BURTON & CO.

MARRIED WOMEN. *Separate estate. Profits.* The profits and accretions of a wife's separate estate in land enure to the wife, and cannot be seized for the husband's debts, unless it be clearly shown by the creditor that the wife has relinquished to the husband her separate interest in said profits and accretions.

FROM RUTHERFORD.

Appeal from the Circuit Court of Rutherford county. W. H. WILLIAMSON, J.

SHEAFE & ENGLES for plaintiff.

RIDLEY & RIDLEY and BURTON & MCNEELLY for defendant.

SNEED, J., delivered the opinion of the court.

Nelson v. Hollins, Burton & Co.

This action of replevin was brought by S. B. Nelson, a trustee for his wife, Sarah H. Nelson, to try the title to certain horses, mules, and other property, levied upon by a constable of the county of Rutherford at the suit of the defendants. The property is claimed by Mrs. Nelson as of her separate estate, and was seized as the individual property of her husband. Mrs. Nelson had and held a separate estate in a tract of land upon which the family lived, and there was testimony tending to show that the property replevied was purchased with the profits and proceeds of the farm. Upon these facts the court charged the jury that if they believed, from the proof, that the property levied on and replevied was purchased or produced by the profits of the lands held by S. B. Nelson, as trustee for his wife, such property would not be liable for the husband's debts.

Property thus acquired from the use of land, which was held by the husband for the sole and separate use of the wife, would be impressed with the same trusts in her favor in the hands of the husband as the land itself, and the said Nelson, as trustee of his wife, could maintain replevins to protect the possession of it against his own creditors. These instructions, in the opinion of the court, are correct. The separate estate in the soil vested in the wife such an interest in the profits and accretions thereof that she might assert against her husband and all the world, and the courts would protect her in the enjoyment of these profits and accretions, if it appears that they were the product of the separate estate, and she had never parted

with her interest in them in any way to her husband. The separate estate in the soil intended for the support and maintenance of the wife, would be of very little utility to her, if her husband or his creditors could deprive her of that alone which makes it valuable, its profits and accretions. The exclusive right to the soil draws to it the exclusive right to the usufruct thereof. This she may relinquish to her husband if she chooses, but if it be clear that her land produced the profits and accretions that bought the chattels in dispute, then a very clear case must be made, by the party seeking to subject them to the husband's debts, that she has relinquished them to him. The mere fact of his controlling the property or directing the management of her farm is no evidence of such ownership. The law presumes that he is acting as her agent, and the conjugal relation would make it his duty to protect and utilize her separate estate for her benefit. If property thus produced is claimed by the creditors of the husband, they must show his right, for the presumption would be the other way. She must be shown to have lost her individuallity in respect to that part of her separate estate, by relinquishing it some way to her husband. We are satisfied with his honor's charge and hold it to be a strictly accurate statement of the law. But, upon the facts of the case, we must hold that the verdict and judgment are erroneous.

The witness, Lafayette Nelson, son of the plaintiff, states generally that all the property replevied was bought with the proceeds of the farm—but, when he undertakes to state the facts in detail on cross-examin-

ation, he fails to make good his more general statement as to a part of the property. The mare spoken of he says was brought by my father and mother from Cannon county, and is the dam of the mules replevied in this cause. I was quite small and do not remember who bought and paid for her. The verdict, as to this part of the property, was against the evidence, and for this a new trial must be awarded.

Reverse the judgment.

WESLEY HARVEY, Adm'r., *v.* JOHN HUGHES, *et al.*

CHANCERY PRACTICE. *Petition to compel surety to pay money into court. Bills and notes. Principal and surety.* H. was sued in the chancery court, and a fund belonging to him attached. H. borrowed the fund, and gave bond with T. as security. H. then loaned the fund to T., his surety, taking his note himself therefor. H. subsequently filed his petition in the chancery court, stating that T. was in embarrassed circumstances, and praying that he be required to pay the money into court. The chancellor made an order upon T., at Chambers, requiring him to do so. Upon a petition for a supersedeas, filed in the supreme court to supersede the order of the chancellor. *Held*, That the order was improper, and that the money could not be collected from T. in that way, it being due from T. to H. personally.

FROM JACKSON.

Appeal from the Chancery Court.

No record can be found.

Complainant filed his bill in the chancery court at Ganesboro, alleging that defendant Hughes was indebted to him, and attaching a fund in the hands of one of the other defendants, due to Hughes, amounting to $2,500. Hughes gave bond with Tenison, Paschal and Harrison, and was allowed to receive the fund. To indemnify Tenison as his surety, Hughes placed the fund ($2,500) in his hands, for which Tenison executed his note. The transaction took place in 1875. The cause is still pending and undetermined.

In December, 1877, Hughes filed his petition in the cause, alleging that Tenison was embarassed, and offering a new bond with good security, praying that Tenison be required to pay the fund into court, and that the new bond be accepted in lieu of the present bond.

The petition was presented to the chancellor, and an order made requiring Tenison to pay the money into court by February rules, 1877, or show cause why he should not do so.

Upon this order being served on Tenison he has filed a petition for a supersedias of the order.

It is stated in the briefs of the counsel that Paschal & Co., surety, has united in the application with Hughes, but there is nothing on file to show it, nor that complainant assents or takes part in the application. If the complainant thought the bond insufficient as security for the fund, he might take steps to have sufficient bond executed, or to require

the fund to be paid into court, or if one of the sureties thought himself in danger, he might adopt measures for his indemnity.

But although the allegation of Hughes, that Tenison is embarrassed, would scarcely be a sufficient ground to require a new bond, without any allegation as to the insufficiency of the other sureties, yet even these allegations have reference to the note executed to himself and not to the bond taken in court. When the bond was executed and accepted, and the attached fund released, Hughes took it and loaned it to Tenison, and took his bond to himself, and his petition seeks in this snmmary way to have the chancellor collect this money, due from Tenison to him individually, and to have it paid into court, or to himself, upon the execution of a new bond.

The order in this case, made by the chancellor at Chambers, is, that Tenison, who is the debtor to Hughes, shall pay into court the money due from him to Hughes, on Hughes petition and offer to give a satisfactory bond already on file. This we think the chancellor has no power to do, and that the order is therefore erroneous and must be superseded. But the supersedias of this interlocutory order of the chancellor is not to be interpreted as restricting his right to accept from Hughes a satisfactory bond in lieu of the one now on file, nor as hindering Hughes from taking such steps for the collection of Tenison's as he may choose to take.

THE STATE *v.* T. J. KEETON AND D. A. MCGRADY.

1. PUBLIC SCHOOL LAW. *Violated. When.* A contract to set out trees, shrubbery and evergreens around a school-house, or a contract to enclose a school-house with a fence, and to furnish furniture for the room, is such a contract as the Board might make, but, when made with a director, it is in violation of the 19th section of the public school law, and is a misdemeanor under sec. 4596 of the Code.

2. CONTRACT. *Consideration implied. When.* The making of a contract implies a consideration, and the charge of taking a contract imports, *ex vi termini*, an agreement to do on a sufficient consideration.

FROM DAVIDSON.

Appeal from the Criminal Court. THOMAS N. FRAZIER, J.

TRIMBLE for defendant.

ATTORNEY-GENERAL for the State.

FREEMAN, J., delivered the opinion of the court.

The defendants in these cases are indicted for violating the 19th section of the public school law. It is that no director shall be a teacher in the public schools of his district, nor take any contract for building a school-house in his district, nor any contract which his board is competent to make, nor become the owner of a school warrant. The offense in one case, is a contract to set out trees, shrubbery

and evergreens around the school-house; in the other, a contract to enclose the school-house with a fence, and furnish desks and furniture for the house. The contracts are clearly such as the board might make, and are forbidden by the statute.

By sec. 4596 of the Code, it is provided when the performance of any act is prohibited by statute, and no penalty for the violation of such statute is imposed, the doing such act is a misdemeanor. This is precisely the case before us. It may be that these contracts were innocently made; but the evil intended to be guarded against, was the danger of public officials using their positions, and influence incident to them, in procuring advantageous contracts to the public detriment, in matters under their official control, with the spirit of official peculation so rife in the land. The court cannot fail to see the propriety of strictly enforcing all laws intended to guard the public against such abuses.

It is argued, however, that in the case of Keeton, it is not averred he took or received pay for the work he contracted to do. There is nothing in this, as the making a contract necessarily implies a consideration, and the charge of taking a contract imports, *ex vi termini*, an agreement to do on a sufficient consideration.

If it was a gratuity, it may easily be shown in defense by proof. No corrupt motive need be alleged. It is a thing forbidden regardless of the motive.

Reverse and remand for further proceedings.

MARY A. REDMOND *et al.* *v.* Y. W. REDMOND.

1. SUPERSEDEAS. *How and in what cases supreme court can exercise it.* Under the authority given the supreme court by secs. 3933, 3934, 4512 and 4513 of the Code, to supersede interlocutory orders and decrees, that court can simply suspend or supersede, for the time being, the execution of such orders and decrees as are of a nature to be actively and affirmatively enforced, and are *in fieri;* but have no power, in this mode, to reverse the action of the inferior court, or to set aside, or annul, or supersede orders or decrees, which are merely of a negative or prohibitory character, or such as have been executed.

Cases cited: McMinnville & Manchester R. R. Co. v. Huggins & Price, 7 Cold., 217; Mabry v. Ross, 1 Heis., 769.

2. SAME. *Chancellor's fiat.* Nor has the supreme court, in a proceeding of this character, the power to supersede the *fiat* of a chancellor awarding extraordinary process.

FROM WILLIAMSON.

Appeal from the Chancery Court. W. S. FLEMING, Chancellor.

HARRISON & BRADFORD for complainants.

WALLACE, CAMPBELL, MCEWEN and BULLOCK for defendant.

MCFARLAND, J., delivered the opinion of the court.

Two cases are pending in the chancery court at Franklin—one styled "America Redmond *et al.* v. Y. W. Redmond," and the other "Mary A. Redmond *et al.* v. Y. W. Redmond"—when, on the 23d day of

December, 1876, a bill supplemental, as it is styled, was filed against the same defendant by Mary Ann Redmond and others, praying for an attachment of Redmond's estate in aid of the proceedings. The process was awarded by a *fiat* of a chancellor, and issued, and returned executed on the 16th of January, 1877. Y. W. Redmond presented his petition, in which he shows that an attachment had issued under said bill to Williamson county, and been returned levied upon certain property, and in which he prays that the attachment and levy thereof upon his property be discharged. This relief is prayed for upon the ground that upon the face of the bill the process was not authorized, and that the same was void upon its face. The defendant thereupon moved in open court, upon the face of the supplemental bill and attachment and upon his petition, to dismiss the bill and quash the attachment, upon the following grounds: 1st. The bill did not allege that it was the first application for attachment. 2d. That the bill contained no statement of the amount of the alleged claim or demand against the defendant. 3d. That there was no allegation that the claims or demand were just. 4th. That the pauper oath to the bill was taken by part only of the complainants. 5. That the attachments themselves did not state upon their faces the things required by the Code to be stated in writs of ancillary attachments. Pending this motion, the complainants moved to amend by showing it was the first application for attachment, and also as to the pauper's oaths; and the court was of the opinion, as shown

in the decree, that in these two respects the proceedings were amendable, and that the other grounds stated for this motion, and in the petition, were not well taken, and thereupon denied the motion to dismiss the bill and quash the attachments, and allowed the complainants to amend in the two particulars mentioned. This is the entire substance of the decree.

Another order was made on the 19th of January, but it is not material to notice it.

On the 23d of January, 1877, Redmond presented his petition to one of the judges of this court, accompanied by a transcript of the supplemental bill, petition to quash, and the two decrees responded to, the attachment, including an attachment to Davidson county, and the return thereof of the execution of the same by a garnishment served on Edgar Jones, cashier of the Third National Bank of Nashville, and the answer of Jones to the garnishment. The petitioner prays for a *supersedeas*, in these words: "Petitioner prays your Honor to grant him a writ of *supersedeas* superseding the execution of said interlocutory decree, so far as the same does or can warrant the writ of attachment so issued to the county of Davidson and the steps so taken thereon, and so far as the same does or can warrant the issuance of any other writ of attachment against his estate; and the *fiat* of the chancellor, so far as the same does or can warrant the issuance of any other attachments hereafter against the estate of the petitioner; such other relief," &c.

The *fiat* of the judge grants the *supersedeas* prayed for, "upon the usual bond."

A motion is now made in this court by the complainants to discharge the *supersedeas*, and by the defendant to extend the same to the full extent authorized by the judge's *fiat* when the *supersedeas* issued, it is said does not do.

We have several times followed the construction given to the section of the Code on this question in the case of the *McMinnville R. R. Co. et al.* v. *Huggins & Price*, 7 Cold., and in *Mabry* v. *Ross*, 1 Heis., 769. That is, that under the authority given to supersede interlocutory orders and decrees, we can simply suspend or supersede, for the time being, the execution of such orders and decrees as are of a nature to be actively and affirmatively enforced against a party in *fieri*, but we have no power in this mode to reverse the action of the inferior court, or set aside, or annul, or supersede orders or decrees which are merely of a negative or prohibitory character, or such as have been executed. We cannot, therefore, supersede an order granting an injunction, as this requires nothing to be done, but is simply prohibitory; nor can we supersede an order dissolving an injunction, as the decree directs nothing to be done to supersede. Such an order would be to grant an injunction.

We have only to apply these principles to the present case. What is the decree of the chancellor which is superseded? What does it order and adjudge? 1st. The decree refuses to dismiss the bill upon motion, or to quash the attachment and levies. It is too clear for argument that we cannot supersede

that part of the chancellor's decree refusing to dismiss the bill upon motion. This would be upon application for *supersedeas* to reverse the decree of the chancellor and dismiss the bill. But, 2d, can we supersede that part which refuses to quash the attachments and discharge the levies? The chancellor's decree in this respect requires no execution—it simply refuses to take the action invoked by the defendant. The motion was refused. How can we supersede the execution of this order? How shall we say that his refusal to make the order moved for shall not be executed? The effect of this would be simply to do what the chancellor refused to do. He was asked to quash the attachments and levies, and refused. But suppose we supersede his refusal and say his order of refusal shall not be molested, what effect does this have on respondent? Simply to leave it as before, unless we go further and say the process shall be quashed. This we certainly cannot do.

But it is said that this order is susceptible of being affirmatively enforced, because the effect of it is to require the defendant to plead or answer at once, which he should not have been required to do. It can hardly be maintained that an order of a chancellor refusing to dismiss a bill upon motion for want of equity and requiring the defendant to answer, could be superseded by this court. If so, we could stop all further action in the court below and yet have the cause pending; for a *supersedeas* does not bring up the case, but leaves it still pending in the court below.

But it is argued that the attachments in this cause

were absolutely void. Suppose they were, this court has no power in this mode to quash the power or declare it void. This application was made to the chancellor, he decided otherwise; his action is not yet before us for review, further than to determine whether he has made any decree the execution of which, for the time being, we may supersede, and, as we have seen, the only decree made is not of a nature to be executed at all, there is nothing to supersede. We can, in this mode, no more reverse the chancellor for refusing to declare this process void than we could reverse any other error. It can hardly be contended that we may supersede that part of the chancellor's decree allowing the amendment. Such an order does not come within the scope of a *supersedeas*.

Again, it is said we may supersede the *fiat* of the chancellor awarding the process, and this is in part the prayer of the petition. We do not think there is any authority for this; there is none in the statute. We may supersede interlocutory or final orders or decrees, but not the *fiat* of a judge granting extraordinary process. If we are to be called upon to supersede the orders of judges and chancellors granting extraordinary process, and direct the clerks not to obey their *fiats*, we will have a new field, an extensive field of labor—one, we think, not authorized by our laws; besides, in this case the *fiat* had been executed. The attachment to Davidson county, which is especially complained of, was executed returned before the *supersedeas* was granted. Whether the levy was valid or not, is not now material.

But again, the prayer of the petition is to supersede the decree and *fiat* of the chancellor so far as it does or can warrant the issuance of any other attachment hereafter. This is certainly novel. There is nothing in the decree about the issuance of another attachment, and it will be time enough to supersede orders after they are made. It is not even stated that any other attachment is apprehended. Besides, it is not intended for a *supersedeas* to operate as a bill of peace.

It is earnestly argued that the service of the garnishment on the Third National Bank did not attach or impound the funds of the defendant in the bank, and that the cashier has shown by his answer that he had no funds in his hands. All this may be true, but this question is not before us. The chancellor, so far as appears in this record, has not acted upon this answer of the garnishee, or upon a motion to discharge him.

We are of opinion that the *supersedeas* must be discharged.

W. B. Lillard *v.* B. F. Puckett *et al*

Chancery Sale. *Surety on notes.* The surety on notes given for land bought at a chancery sale cannot be freed from his liability by averring or showing that his principal will not get a good title to the land bought. If the principal does not ask that the sale be set aside, the security cannot.

FROM RUTHERFORD.

Appeal from the Chancery Court.

No record can be found.

Freeman, J., delivered the opinion of the court.

We need but refer to a few facts in this record to raise the only questions that we deem necessary for the proper disposition of the questions in this case.

A bill was filed by the executor of Charles Puckett, deceased, in the chancery court of Rutherford county, by which, among other things, his lands were asked to be sold. A decree to this effect was made, and the clerk of the court ordered, as commissioner, to sell the same, which was done, Enoch N. Dickson becoming the purchaser at about seventy-five dollars per acre. This sale was made in December, 1859, and reported to this court, when this report was confirmed. Dickson gave two notes with security for the amount bid by him, which fell due, as is alleged

in the bill, before courts were closed by the war. After the war, in 1866, a judgment was taken against Dickson and his sureties for the money due on these notes, the amount with interest being about twenty thousand dollars. It was a part of this decree, and if the amount was not paid by a time fixed, then the land purchased by Dickson should be sold to satisfy the decree, it being the purchase money for the land. In 1867, the clerk and master reported to the court that he had sold the land in pursuance of the former decree, and that Hiram Jenkins became the purchaser at the aggregate sum of $9,644.68, and paid $500 of the same in cash, for balance had given his notes, due in one and two years, with W. R. Jenkins, J. F. Jenkins and Wm. B. Lillard as sureties.

This Wm. B. Lillard, the surety, now files this bill to enjoin the collection of this debt, and insists that, for various irregularities, the sale in the first place was invalid—that is, the one to Dickson—and that the last to his principal is also invalid, and the title obtained, or which may be obtained by Jenkins, will not be good on account of death of parties in the original cause, and failure to revive, and perhaps for other causes.

We do not deem it necessary to go into the details of allegation in this bill, as it is not insisted that there is any ground of defense to the surety growing out of his own contract, that is, that any fraud existed or undue advantage was taken of him. His principal, however, did not in his lifetime seek to avoid the sale, or, at any rate, certainly did not

get clear of his purchase. His heirs do not seek now to do so, and we are totally unable to see any principle on which the surety can be permitted to get clear of his liability on a note given for property purchased by his principal, because he will not get a good title to the property so purchased. If the principal does not avoid the sale, we can see no ground in law or sound reason on which the surety can come forward and insist on having the sale set aside and the purchase declared void, in order to avoid his liability on his suretyship to the notes given. It is true the surety in a case of this kind, on payment of the notes, if the principal was solvent, if insolvent before doing so, might claim the right of substitution to the rights of the creditor, that is, to his lien, and having the property sold for his exoneration or reimbursement; but this right is in affirmance of the contract, and does not involve the right to disaffirm it. We see no ground, as we have said, on which he can claim to do this, and do not feel called on to go into the matters discussed before us. The question we have settled is conclusive of the rights of this complainant in this matter, and it must be so decreed. The complainant will pay the costs of this court; the costs of the court below will be paid as directed by the chancellor.

FREEMAN, J., on petition for rehearing, said:

We have examined petition for rehearing in this case, and can see no ground suggested on which we

can change the result arrived at in former opinion. The fact that the purchaser of the land was dead and insolvent, cannot give the right to his surety on notes for the purchase money of lands to come into a court of chancery to have such sale declared void or set aside. Unless the heirs on whom the estate devolves shall disaffirm it, it must stand. They alone can disaffirm the title then obtained, and until they do this, the surety must stand by this contract in a case like this. A contrary rule would allow the surety to avoid his liability on the note, because he thought the court might adjudge in his favor the title defective, and yet allow the purchaser, or in this case, the heir, to retain the property, his possession being undisturbed.

The principle we lay down in this case is, that the principal having purchased the land, and not having sought to avoid his purchase, nor his heir on whom the estate devolves, the surety cannot do so for them in order to be relieved from his liability on the note for the purchase money. We have been shown no case nor authority that adjudges or holds that he may do so; and until such authority is found, we must stand by the rule announced.

The fact that Jenkins or his heirs may not be able to pay the debt, can certainly not alter the case. The contract may prove a bad one, disastrous even, but while it stands and is not disaffirmed or set aside, and the property remains subject to said contract, the liability for the purchase money remains; the principal is bound for it, and the security can stand on

no higher or different grounds on the facts of this case. In addition, we may say that it can scarcely be doubted that should the surety seek to be substituted to the rights of the creditor, the heirs or devisees of the creditor who collect the money out of him through the agency of the court, would not be allowed to disaffirm the validity of a title which they have affirmed by taking the proceeds of the judgments on the notes given for the purchase money. They could not be heard to insist on getting the proceeds and at the same time claim the land for which the money was paid.

We do not think it necessary to answer the various propositions so ingeniously presented in the petition for rehearing. If we are correct in the main position, it is conclusive of the case, and we can have no doubt of the correctness of that position.

Dismiss the petition.

W. J. LITTLE *et al.* *v.* THE STATE.

BAIL BOND. *Judgment on. Security on appeal. Liable for. What.* A bail bond is a bond for the payment of money within the meaning of the Code, sec. 3162, and on appeal from a judgment thereon, the security is bound for the whole debt, damages and costs.

Case cited: Banks v. Brown, 4 Yer., 198.

Code cited: Sec. 3162.

FROM WARREN.

Appeal from Circuit Court. J. J. WILLIAMS, J.

T. B. MURRY for plaintiff.

ATTORNEY-GENERAL for the State.

SNEED, J., delivered the opinion of the court.

The appellants are the sureties on a bail bond executed by one Hudson for his appearance at the circuit court of Warren county to answer the State on an indictment for murder. The bond was in the penalty of five thousand dollars. Upon the default and failure of the said Hudson to appear, a forfeiture was entered against him and the appellants as his sureties, and writ of *scire facias* issued against the appellants, requiring them to appear and show cause why the State should not have judgment final against them. They did appear, and issues were had upon their pleas to the writ, which were upon trial determined against them, and judgment thereupon rendered

for the amount of the bond. They appealed in error to this court, upon a bond for costs only.

The attorney-general now enters a motion to dismiss the appeal, upon the ground that the bond for the appeal is not such as the law requires. He insists that the recovery in the case is upon a bond for the payment of money in the sense of the act of 1827, ch. 72, and that the appeal bond should be in double the amount of the judgment.

That act is in the words following: "In actions founded on bonds for the payment of money, bills single, bills of exchange, promissory notes, liquidated accounts signed by the party to be charged therewith, written obligations for the payment of bank notes or promissory notes, bonds or written obligations for the delivery of specific articles, or on endorsements of negotiable instruments, if the appellant takes an appeal, in the nature of a writ of error, from an inferior to a superior jurisdiction, the bond shall be taken and the sureties bound for the payment of the whole debt, damages and costs, and for the satisfaction of the judgment of the superior court, when such cause may be finally tried and determined." * * Act of 1827, ch. 72, sec. 1; Code, sec. 3162.

Is a bail bond for the appearance of a prisoner to answer an indictment for crime, a bond for the payment of money in the sense of the statute? We have no direct adjudication of this question.

It would certainly seem to be the policy of the law, when the State recovers a money judgment or decree upon any form of written obligation, to give

to the sovereign, upon appeal, at least an equal advantage with the citizen in having the payment of said judgment secured.

It was held in *Banks* v. *Brown*, 4 Yer., 198, that a delivery bond was a bond for the payment of money in the sense of the statute. But it is said that this decision may have been based upon the words of the statute which includes in its provisions "bonds or written obligations for the delivery of specific articles." We apprehend that these words refer to what are known as property contracts, where the liability of the obligor is absolutely fixed to pay the estimated value of the specific articles upon a breach of the condition of the bond. The bond referred to in this case was not, as we think, a bond for specific articles, or what we term a property contract, but a technical delivery bond, where a slave or other property was attached or levied on, and a bond for money was executed, to be void on condition that the property was duly delivered to answer the mandate of the law. The report does not describe or characterize the bond otherwise than to call it a delivery bond, and the court holds that the delivery bond was a bond for the payment of money in the sense of the statute, and that a motion in the circuit court on such a bond was "an action" in the sense of said statute. The bond in this case is for the payment to the State of the sum of five thousand dollars, but conditioned to be void if the said principal shall appear, &c. Now, why is not this a bond for the payment of money? Does the condition exclude it from the stat-

ute?—if so, upon what principle? All bonds to the State are conditional. All fiduciary bonds are conditional, as guardians, administrators, &c. Upon a recovery upon such a bond, would an appeal be allowed upon a mere bond for costs?

The principal obligor in this case has made default, and the State, by *scire facias*, has instituted her action to recover the debt now due for said default, and recovers judgment. Is not this a judgment upon a bond for the payment of money? Why is it any less so because it might have been cancelled and discharged by the appearance of the accused?

We must hold that it is a bond for the payment of money in the sense of the statute, and that, upon appeal in error, in such case the appeal bond must conform to the statute.

It results that this case is improperly here and will be dismissed, with leave to the appellants to execute a proper bond on or before the third Thursday in February of the present term, or otherwise comply with the law.

McFarland and Turney dissent.

MARGARY W. SETTLE *v.* WM. WENDEL, Ex'r, *et al.*

CHANCERY PRACTICE. *Creditor by deed. Redemption. Deed of trust. Principal and surety.* A security upon a debt which is set out in a deed of trust, and who purchases the land at the trustee's sale, is not a creditor by "debt acknowledged by deed" within the meaning of the Code, sec. 2127, which permits such creditor and purchaser to advance upon his bid.

FROM RUTHERFORD.

Appeal from the Chancery Court.

No record can be found.

FREEMAN, J., delivered the opinion of the court.

In 1865 or 1866 John Hill made a deed of trust, conveying, among other things, a valuable tract of land to D. D. Wendell, in trust, to pay certain debts therein specified. Debts amounting to about $11,970 were in the first class to be paid under this trust. One of these debts was due to Alfred Blackman, on which defendant Geo. Batey and one Gooch were joint sureties. Hill was also indebted to Mrs. Settle as executrix in the sum of about $9,000, which was acknowledged by the deed. The trustee, Wendell, proceeded to sell the land on December 5, 1867, when Batey became the purchaser, at the sum of $10,593.44. The sale was on a credit except as to one-fourth, which was paid in cash. Mrs. Settle proposed to redeem as creditor with a debt acknowledged by deed,

and sent her son, as agent, to Murfreesboro for the purpose, assuming, under a misapprehension of the law, that she was bound to redeem in twenty days after the sale. Wendell, the trustee, was acting as the agent of the purchaser, Batey, at this time, who had, as such purchaser, advanced a debt due himself, acknowledged by the deed, of about $1,562, of which advance it is admitted in the bill Mrs. Settle had notice. She claims, however, in the bill that Wendell refused to allow her to redeem unless she would also pay in addition to this the sum of $1,683.89, the amount which the trust fund failed to pay on the Blackman debt, on which Batey and Gooch were joint sureties as before stated, and on which as such surety, so far as the record shows, he has never paid anything, certainly had paid nothing at the time. Finding that another creditor, Miller, desired to redeem, she charges that her agent at last paid the cash payment and gave his notes for the balance—one for the sum of $1,683.89, this security debt, but that this was done under protest against the right of Batey to exact, and with the distinct understanding that if Batey was not entitled to advance on his bid this liability as surety, then the matter was to be rectified and the money refunded. To enjoin the collection of balance equal to this assumed wrongful charge is the object of the bill in this case, and the question to be decided.

As to the matter of law debated before us, insisting that Batey had the right to advance the balance due on the Blackman debt for which he and Gooch

were sureties, we think it of easy solution. By the act of 1841–2, ch. 6, sec. 617, carried into the Code, it is provided, if the purchaser of land sold as this was is a *bona fide* creditor by judgment, decree or debt acknowledged by deed, and, within twenty days after the sale, makes an advance on his bid, and credits his debt by depositing a receipt therefor with the clerk of the court in which the judgment or decree was rendered; or the sale was under a deed of trust or mortgage, he acknowledges a receipt for such advance before the clerk of the county court for registration, and causes the same to be registered in the county where the land lies, then he shall hold the property subject to redemption at the price bid and such advance as if he had bid the whole sum at the time of the sale. We think it too clear to need argument in this case that Batey was not a *bona fide* creditor, acknowledged by deed of Hill, at the time of his purchase; and only such is allowed to advance his debt by the terms of the statute. He was the debtor of Blackman jointly with Gooch as surety of Hill, but in no sense the creditor of Hill. He might become the creditor of Hill by paying the debt; but not having done this, he cannot be held to stand in the same position as if it had been done; and if he had already paid the debt, it would seem that this fact probably would have to have been recited in the deed of trust, in order to make it a debt acknowledged by deed, within the terms of the statute. Be this as it may, it is clear he is not a creditor on the facts before us. As to the question of fact,

which has been earnestly pressed before us, that Mrs. Settle agreed to and did redeem voluntarily, including the balance on the Blackman debt, and not under protest, and with the understanding with Wendell that the question of law should be settled and her rights abide the result,—after a careful examination of the testimony, we can but conclude with the chancellor, that she has made out her case as alleged in her bill. The bill and answers but make an issue in the case. We can see no definite contradiction of Leroy Settle's statements, except the testimony of Batey, the defendant, that he did not understand the Blackman debt was to be included until the day of the redemption. He states circumstantially the facts, and that he had taken the amount of cash, or made arrangements to pay the amount of cash on the basis of the advance only of Batey's individual debt, and was embarrassed on account of this fact. In this he is corroborated by Baird, who was present when the redemption was had. It is also corroborated, to some extent at least, by the date of Batey's advance, which which was on the 24th, the redemption being on the 26th. But we think Wendell's letter is conclusive on this question—in which he says it is simply a question of law, and one of easy solution, and then gives his view of the case; that is, that Batey was liable for the whole of balance of the Blackman debt, as well as his co-surety Gooch. We see nothing in the case to indicate that he had ceased to be the agent of Batey in the matter, but, on the contrary, we think it pretty clear that he was the trusted agent of Batey in the whole

matter up to the time of his death, and certainly maintained the precise view of his legal rights now insisted on by his counsel. As a matter of course, Batey cannot take the benefit of the action of Wendell and avoid the responsibilities connected with that action in the matter of the agreement.

Without further argument, we affirm the decree of the chancellor with costs.

JOHN R. WILEY *v.* JAMES H. BENNETT.

PLEADING AND PRACTICE. *Attachment. Affidavit for not sworn to. Clerk's failure to sign the writ. May be had in forma pauperis. When.* The fact that the clerk failed to attest that the affidavit had been sworn to, is not fatal to an attachment, but his failure to sign the writ renders it void, and cannot be cured by amendment. An ancillary attachment may be had *in forma pauperis.*

Cases cited: Watt & Co. *v.* Carnes, 4 Heis., 532; Barlow *v.* Dinning, 4 Sneed, 269.

FROM COFFEE.

Appeal from the Circuit Court. W. P. HICKERSON, J.

B. M. TILLMAN for plaintiff.

W. J. CLIFT for defendant.

FREEMAN, J., delivered the opinion of the court.

An action of trespass was commenced in this case, and at the same time an application made for an ancillary attachment, based on affidavit "that defendant absconds and is absconding so that the ordinary process of law cannot be served on him, and that affiant has a just claim on him for damages for $2,500," stating the pendency of a suit and where pending. The party also added the oath *in forma pauperis*, and asked for the attachment without bond on this ground. In the circuit court, on motion, was quashed, and an appeal prosecuted to this court.

Several objections are presented in the motion to quash. First, that the clerk had failed to attest the fact that the affidavit had been sworn to. This objection is not well taken, as the affidavit was signed by the party, and purports to have been sworn to on its face. The fact is further shown by the clerk that it was duly sworn to before issuance, but by oversight the attestation of the fact was omitted. The fact that it was sworn to is the substantial matter, and the omission of the clerk to do his duty by attesting it, cannot be allowed to prejudice the party. The amendment of this defect ought to have been allowed. This is not like the case in 4 Heis., 532, where the affidavit was not sworn to until some weeks after the issuance of the process, the clerk then doing it himself, and no amendment of the affidavit being directed by the court. That was held unauthorized and the attachment void, because issued without the

affidavit required by law. The clerk had no authority to make the amendment, as was held in that case. *Ibid.*, 535 *a*.

Such an attachment may be had *in forma pauperis*, as held in the case of *Barber* v. *Dinning*, 4 Sneed, 269; and we may add, as a matter of course under the above decision, that before the plaintiff can proceed against defendant by filing a declaration and asking judgment, he must have service of the original process on him to which this attachment is ancillary. That question is not, however, now before us.

Without noticing other objections, which are not tenable perhaps, we find one which seems fatal, and sustains the judgment of the circuit judge, probably the one on which he quashed the writ. It appears the writ was not signed by the clerk of the court who issued the same. The Constitution of the State requires that all process shall run in the name of the State, and bear test and be signed by the respective clerks. The writ without their signature is no more than a blank piece of paper, and must be held void. An amendment could not aid this, as a new writ must be made by a signature of the clerk, and this must be levied on the property, the levy on this void writ being a nullity. We therefore affirm the judgment of the circuit judge on this ground.

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THE STATE v. J. M. LASATER.

1. CRIMINAL LAW. *Keepers of hotels. Rights.* The 2d section of the act of 1875, ch. 130, which gives a right of action to the keeper of any hotel, theater, public house, restaurant or common carrier, against any person guilty of turbulent or riotous conduct, within or about the same, etc., does not violate Sec. 17, Art. II. of the Constitution, forbidding the passage of an act embracing more than one subject; nor is it in violation of the 16th section of the Bill of Rights, forbidding excessive fines and punishment.

2. CONSTITUTION, Art. II, Sec. 18. *Per Curiam.* "The evil intended to be remedied by this provision, is to prevent laws upon one subject being tacked on to a bill upon a wholly different subject, and in this way, sometimes elude the attention of the Legislature, and pass without sufficient consideration."

FROM DAVIDSON.

Appeal from the Criminal Court. THOS. N. FRAZIER, Judge.

ATTORNEY-GENERAL for the State.

——— ——— for defendant.

MCFARLAND, J., delivered the opinion of the court.

This indictment was quashed by the Criminal Court and the attorney-general has appealed. It is predicated upon the 2d section of the act of 1875, ch. 130. The first section in substance abrogates the common law giving a right of action to any person excluded from any hotel or public means of transportation or place of amusement, and gives to the proprietors of

such hotels, places of amusement or means of transportation, the right or option to admit or reject any person they may choose, for any cause, giving the same right of control as the owner has over his private residence or private carriage.

The 2d section is as follows: "That a right of action is hereby given to any keeper of any hotel, inn, theater or public house, common carrier and restaurant, against any person guilty of turbulent or riotous conduct within or about the same, and any person found guilty of so doing may be indicted and fined not less than one hundred dollars, and the offender shall be liable to a forfeiture of five hundred dollars, and the owner or person so offended against may sue in his own name for the same."

This is an extraordinary statute. It is generally understood to have been passed to avoid the supposed effects of an act of Congress on the same subject, known as the civil rights bill. And it is left now to the court to determine whether there be any valid constitutional objection to it. 1st. Does it violate Sec. 17, Art. 2: "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title." We have stated the substance of the entire act. The title is "an act to define the rights, duties and liabilities of inn keepers, common carriers and proprietors of places of public amusement." Does the bill embrace more than one subject? Is that subject expressed in the title? And if the second section be also on the same subject, it may also be regarded as expressed in the title.

So that the question is this: Is the second section, or that part of it making it an indictable offense for any person to be guilty of turbulent or riotous conduct within or about a hotel, theater, etc., legislative upon the same subject embraced in the first section, or is it legislative upon a different subject? The evil intended to be remedied was to prevent laws upon one subject being *tacked* on to a bill upon a wholly different subject, and in this way sometimes elude the attention of the Legislature and pass without sufficient consideration, and when passed often remain for some time undiscovered, by reason that the title of the act fails to call attention to it. This provision of the Constitution is a salutary one, and should be rigidly enforced according to its true spirit and intent, but not so as to embarrass the necessary legislation. Legislation upon different subjects, and upon subjects not indicated in the title of the act are forbidden, but it was not intended that every provision or feature of the law should constitute a different subject so as to make it necessary to pass separate acts in regard to each; nor was it intended that the title should express fully everything contained in the act.

Here, the subject is the rights, duties and liabilities of inn-keepers, common *carriers* and proprietors of places of public amusement, etc. Now, a provision that no turbulent or riotous conduct shall be allowed in such places and providing for the punishment of the offenders, we think, is not legislation on a different subject. Looking to the evil to be remedied and bearing in mind that there must be a clear violation

of the Constitution before we can declare an act void, we hold that this act is not void on this ground.

The circuit judge was of opinion that the act violates the 16th section of the bill of rights, which declares, "That excessive bail shall not be required, nor excessive fine imposed, nor cruel and unusual punishment inflicted." At what point courts could interpose their opinion as to the degree of punishment proper to be inflicted, and overrule the action of the Legislature in upholding this provision of the Constitution, would be a difficult and delicate question. Whether the courts have the power to annul the acts of the Legislature on this ground, or whether the provision is simply directed to the Legislature to govern them in the passage of laws, and to the courts in inflicting punishment in cases where the punishment is within the discretion of the courts, we need not now determine. We are aware of no construction of this clause by our courts. But we hold, that in any event the punishment prescribed, although severe, more so than in other kindred offenses, is not so cruel and unusual as to authorize the courts to declare the act void, even if we could do so in any

The next objection is, that the indictment does not charge the offense defined in the statute. The charge is, that "James M. Lasater was, on the 18th of October, 1876, in Coffee county, etc., guilty of turbulent and riotous conduct within and about a hotel in the town of Manchester, kept by one Joel Stower, by then and there quarrelling, committing assaults and

batteries, breaches of the peace, loud noise and trespass upon said hotel." It is argued that it was the intention of this act to protect hotel-keepers and others from a combination of several parties to force themselves into such hotels, etc., against the will of the proprietors. This was probably the object had in view, but the offense is defined in the indictment with more particularity than in the act. The nature of the turbulent and riotous conduct prohibited is not defined in the act. It is argued that "riotous conduct" has reference to riot at the common law, and therefore cannot be committed by one person; but the language is a right of action given against any person guilty of turbulent or riotous conduct, and any person found guilty, etc.

We know of no technical definition of "turbulent conduct" that renders it impossible for one man to be guilty of turbulent conduct, and if the argument be sound as to riotous conduct, the terms turbulent or riotous conduct is used in the alternative, and a charge of either would be sufficient.

We conclude, that while this act seems severe as to the ordinary cases which may be embraced in its provisions, that it is not our province to abrogate it, and that the indictment charges the offense defined in the statute with reasonable certainty.

The judgment quashing the indictment must be reversed and the cause remanded.

THE FIRST NATIONAL BANK OF FAYETTEVILLE v. D. W. CLARK.

ORDERS. *Assignment of claim. Office and officers. Clerk and master.* Where a clerk and master accepts an order on him, for a fund to be collected by him, on condition that the order is presented on the day the notes fall due: *Held*, that his liability depends upon the presentation of the order at that time.

FROM LINCOLN.

Appeal from the Circuit Court. ———, Judge.

No counsel marked.

MCFARLAND, J., delivered the opinion of the court.

In certain causes pending in the chancery court at Fayetteville, an order was made directing the clerk and master and special commissioner, out of the first funds coming to his hands from the sale of the lands in the cause, to pay J. W. Newman $300, with interest from the date of the order, as part of the cause, first retaining a sufficiency to pay the court costs. On the 17th of April, 1875, J. W. Newman drew his order, addressed to D. W. Clark, clerk and special commissioner, directing him to pay the amount to the First National Bank of Fayetteville. The or-

der also guaranteeing the payment of the same to the bank by the 15th of April, 1876. Upon the same day this order was presented to Clark, and he endorsed thereon as follows:

"I, Davis M. Clark, clerk and master, will pay the above amount out of the first funds that come into my hands out of the funds in the above causes, when the same is paid into court, after paying all charges on said fund and all costs according to decrees, *when same is presented for payment, on day the notes become due.* (Signed) D. W. Clark."

The order was not presented for payment on the day the notes became due. The order was given by Newman to Woodward, cashier of the bank. On the 11th of February, 1876, having forgotten the previous order to the bank, Newman directed the money to be paid to E. S. Allen, and it was paid accordingly. Before doing this, having some uncertainty in his mind as to the matter, Newman asked Wood, the president of the bank, if he had transferred him the fee. Wood, understanding this enquiry to relate to a transfer to him personally, and not knowing of the transfer to the bank, answered in the negative. This satisfied Newman that he had not previously transferred it, and he accordingly directed the money paid to Allen. Wood, the president of the bank, was one of the sureties upon the land notes out of which the $300 was to be paid, and judgment had been taken against him. Clark, when ordered to pay the money to Allen, collected it from Wood for the purpose. Under these facts the bank, by its action, seeks to recover

the amount of the order from Clark, but failed in the action.

The order of Newman transferred his right in the fund to the bank. As between them, this was complete. But Clark had no interest in the matter—was a mere officer of court, and bound only to pay out the fund according to orders and decrees in the cause. Had there been an order or decree becoming part of the record directing the money to be paid to the bank, Clark's payment to any one else would not have released him. But he was not bound to accept this order, and any acceptance made by him might well be accompanied by such conditions as he deemed necessary for his own protection. Having no interest in the matter, his promise not resting on any consideration, the law of banks and commercial paper would not apply, and it would only be a question whether the subsequent payment of the money on the order of Newman to another party was, under the circumstances, such a wroug upon the part of Clark as should render him liable to the bank for the money. Although Clark had notice of the assignment, he was not the debtor, but, as we have said, merely an officer of court, and perhaps knowing the danger of forgetting or losing sight of the order or transfer, he annexes as a condition upon which he undertook to see that the money was paid on this order—that it should be presented on the day these land notes fell due. Had this been done, he might have protected himself. We do not hold that the right of the bank to the fund as against Newman depended upon a pre-

sentation for payment on that day; but under the facts of this case, the right of the bank to hold Clark liable for having paid the fund to the wrong party did depend upon such presentation.

Such was the opinion of the circuit judge, and his opinion will be affirmed.

WOODLIE *v.* TOWLES AND WIFE.

HOMESTEAD. *Debt contracted before passage of law. Statute of limitations. New promise after passage of law.* The statute of limitations operates *only* to bar the remedy; a new promise, therefore, is not the substantive cause of action, but the original debt. Hence, under the act of 1870, a homestead is not exempt from the payment of a debt contracted *before* its passage, although the bar of the statute has been completed, if the new promise is made *subsequently* thereto.

Cases cited: 7 Yer., 543; 4 Yer., 74; 9 Yer., 63; 2 Swan, 513.

FROM WARREN.

Appeal from the Chancery Court. A. S. MARKS, Chancellor.

JONES & LIND for complainant.

W. V. WHITSON and JAS. S. BARTON for defendant.

DEADERICK, C. J., delivered the opinion of the court.

In 1866, and before the passage of the homestead law, the defendant owed the complainant a debt evidenced by note. In 1872 he promised to pay this note. After this promise was made and more than six years after the note fell due, suit was brought upon its face and judgment recovered.

The defendant insists that conceding that the promise proved is sufficient to avoid the bar of the statute of limitation, that such promise is a new cause of action, and as it was made subsequently to the passage of the homestead law, that he is entitled to have exempted from the judgment the homestead under the act of 1870. It is true that the promise to pay a debt barred by the statute of limitation is often spoken of in the books as giving a new cause of action, and it has been said that the action must be on the new promise. 6 McLean, 189.

So it has been said by this court that a claim barred by the statute is deemed in law extinguished and discharged, and that the new promise is no continuation of the old contract, although such original contract furnished a sufficient consideration for the new agreement. *Belote* v. *Wayne*, 7 Yer., 543, citing *Bell* v. *Morrison*, 1 Peters, 351. If a debt is extinguished and discharged by the bar of the statute, and the promise to pay it is a new and substantive cause of action, it would seem logically to follow that the action should be brought upon the new cause, or the promise to pay, and not upon the extinguished and

discharged debt. But this court has also held that in personal actions to enforce executory contracts the statute of limitations only operates as a bar upon the remedy, and from this deducts the conclusion, that a distinct and unequivocal acknowledgment will revive the debt. 7 Yer., 74.

It would perhaps hove been more accurate to say, such acknowledgment would revive or restore the remedy. The debt was not extinguished, but the remedy was lost by the operation of the statute. But in the later cases this court has held that in personal actions upon contracts, the statute of limitations bar the remedy only and do not extinguish the debt.

In one case Judge Reese, in referring to the use of the words "extinguishment," and "extinction," as employed by Justice Story in reference to claims barred by the statute, says "it is believed that the learned judge means total extinction of the remedy only," and adds, that perhaps in every instance where the law creates a bar it acts upon the remedy; the party himself extinguishes the debt. 9 Yer., 63–4. And Judge McKinney says, in a still more recent case: "A statute of limitaaions in the nature of a negative prescription applies not to the right, but merely to the remedy. The debt is not extinguished, nor the right destroyed, and hence upon the express promise or admission of the debtor, the payment of the debt may be afterwards enforced." 2 Swan, 513.

In a number of cases cited in note to section 441, of 2 Gr. Ev., the rule in Massachusetts and New York is stated to be that the new promise by which

a debt is taken out of the operation of the statute of limitations, does not create a new and substantive cause of action, but operates only as a waiver of a defense to an action on the old promise and the removal of the bar of the statute; this is the original debt which constitutes the ground of action and forms the basis of the payments.

It is upon this theory and principle that suits are instituted and conducted upon debts *prima facie* barred. The mode of proceeding in our courts is to institute an action of debt upon a note, although upon its face it appears to have fallen due more than six years before the suit is commenced. This note is declared upon and made profert of by the declaration. If the defendant plead the statute of six years it is a good defense, and defeats the recovery. If, however, it is replied that within six years before suit began the defendant promised to pay the note sued on, and this replication is proved, the plaintiff obtains judgment, not upon the new promise, but upon the note with interest from the time it fell due.

So it appears the plaintiff sues and recovers upon the note, and it is this note which determines the extent of defendant's liability, and the new promise or acknowledgment within six years had only the operation of defeating the effect of the plea of the statute. 2 Gr. Ev., sec. 441. The new promise relieves the old debt from the operation of the statute, and the statute no longer constitutes a defense to recovery upon it. We have repeatedly held that if a debt was contracted before the passage of the homestead

law, and after its passage a new note is taken for the debt, the homestead would not be exempt from an execution issued upon a judgment obtained upon such new note. Yet in such a case the debt for which the new note was executed would be extinguished, but the consideration for the new note was the antecedent or old debt.

So in this case, although it should be admitted that the new promise is a new cause of action, as in the case of the new note for the old debt, all the cases and authorities hold that the barred debt is a sufficient consideration for the new promise to pay it, and even in this aspect the homestead would be liable. But we are of opinion that the new promise is not the ground of action, but that the effect is to restore the remedy upon the original debt, and that this original debt is the foundation of the action and the basis of the judgment.

It results from the foregoing opinion that the chancellor's decree should be reversed.

JAMES STOVALL v. THE STATE.

PLEADING AND PRACTICE. *Bastardy. Defendant not entitled to the benefit of reasonable doubt.* Bastardy cases are in the nature of civil redress, although the form of enforcing the remedy is by a State proceeding. Notwithstanding this fact, the defendant is not entitled to the benefit of the doctrine of reasonable doubt, applicable in criminal cases.

Case cited: O'Neal v. The State, 2 Sneed.

FROM FRANKLIN.

Appeal from the Circuit Court. J. W. WILLIAMS, Judge.

ATTORNEY-GENERAL for the State.

JNO. SIMMONS for defendant.

McFARLAND, J., delivered the opinion of the court.

This is a bastardy proceeding. The proof is disgusting in its details and very conflicting, but the jury have settled the conflict and we bow to their superior wisdom on questions of this character.

The only question is, whether the court was correct in holding that the defendant was not entitled to the benefit of the doctrine of reasonable doubt, applicable in criminal cases.

The proceeding is in the name of the State, but in the language of Judge Caruthers, delivering the opinion of the court in the case of *James O'Neal* v. *The State*, 2 Sneed, "these contests are in their nature,

under our laws, between the mother and the reputed father of the unfortunate bastard for the support of the fruit of their mutual crime," and in that case it was held that under the statute giving to either party the right to appeal the mother might appeal, although in the record she was not the party.

We may add, that the effect of a judgment against the defendant is not to punish him for the commission of a crime, but to compel him to pay the necessary sums to aid the mother to support the child and prevent it becoming a county charge. It is in the nature of civil redress, although the form of enforcing the remedy is by a State proceeding, and the judgment is enforced by imprisonment.

The affidavit of the mother is conclusive and makes out the case without more, unless the defendant upon oath deny his guilt in the form prescribed by the statute.

We think, when the issue is made up, it is to be determined by the weight of proof, as in civil cases.

Affirm the judgment.

HENRY GREGORY, Adm'r, v. W. W. ROSS, Adm'r.

BILLS AND NOTES. *Title. Evidence.* The title to a promissory note may be passed without delivery of the note. Evidence was permitted to go to the jury, tending to show a transfer of the note, which was supposed to be destroyed by fire, with instructions from the judge that they were only to consider it as showing a transfer of the note, and not the fact of its existence; *held* not to be error.

FROM RUTHERFORD.

Appeal from the Circuit Court. W. H. WILLIAMSON, Judge.

C. A. SHEAFE for Gregory.

PALMER & RICHARDSON for defendants.

DEADERICK, C. J., delivered the opinion of the court.

This action was brought by W. W. Ross, administrator of Felix G. Ross, deceased, for the use of Alfred Ross, against Henry Gregory, administrator of James Buchanan, deceased, upon a lost note for $1,200, as alleged in the declaration and affidavit.

Three pleas were set up and relied upon in defense of the action: first, the plea of *non est factum;* secondly, the plea of *non assignavit,* and thirdly, the plea of *nil debit.* Issue was taken upon each of said pleas, and there was a verdict for plaintiff, which was set

aside, and subsequently another verdict in favor of plaintiff, and a new trial being refused, the defendant has appealed in error to this court.

There was testimony to the execution of the note by Buchanan, which was satisfactory to the jury and which was sufficient to warrant their verdict upon the plea of *non est factum.* Upon the plea of *non-assignavit,* it is earnestly contended for the defendant below that the evidence is not sufficient to sustain the verdict. There was no written assignment or manual delivery.

The note, as it appears from plaintiff's evidence, was executed by Buchanan in February, 1861, to Felix G. Ross, who died in November, 1862. Shortly before his death, his brother Alfred being his security on a note to Boring, Felix, as W. W. Ross testifies, endorsed the note of Buchanan to Alfred. W. W. Ross further stated: "The note was not present when the transfer was made. Felix G. Ross told Alfred he would give him (Alfred) the Buchanan note, which was at his house, to pay the Boring debt, Alfred being security on the same, and told Alfred to go and get it." Mrs. F. G. Ross was to meet him at the house and deliver it to him. Alfred went and Mrs. Ross failed to meet him. The note was not at the house where F. G. Ross then was and confined by sickness. No writing was done. Soon after this the house of F. G. Ross was burned and many of his papers destroyed.

His administrator made search and was unable to find the note, and made affidavit accordingly. Alfred

did afterwards pay the Boring note, which was for the same amount of the Buchanan note. The conversation between Peter G. and Alfred Ross, as above detailed, was objected to by defendant and admitted by the court, with instruction that the conversation might go to the jury as evidence only of the transfer of the note, under the plea of *non-assignavit*, but that it could not be looked to for the purpose of showing the execution of the note or in corroboration of the evidence of its execution. The objection to the foregoing evidence as to the transfer of Buchanan's note to Alfred Ross is, that it necessarily assumes that there was such a note in existence, and that the existence of the note could not be proved by the declarations of Felix G. Ross, deceased. But the jury were distinctly cautioned that the evidence must not be looked to by them for the purpose of establishing the existence of the note; that it was admissible only for the purpose of showing the transfer of the note—and for this purpose it was admissible, and the plaintiff was entitled to establish the transfer by any competent evidence—and there was no error in admitting the evidence, when accompanied with the clear and explicit instructions of the court for what purpose only it could be looked to. The jury were instructed that the execution of the note must be established by independent and different evidence from that which was admitted merely to establish the transfer of the note. The jury certainly understood these instructions of the court, and we cannot assume that they acted in violation of them. On the contrary, the presump-

tion is that they followed them, especially as we find in the record evidence sufficient to sustain their verdict, outside of that which was objected to, on the issue as to the execution of the note.

But it is further argued, as there was neither an actual delivery nor written assignment of the note, that there is no sufficient evidence of any transfer of it to plaintiff.

The usual mode is to transfer by written assignment or actual delivery, such instruments. In 2 Pars. on Notes and Bills, 52, it is said in case of a note, if possession can be delivered it should be, but that there is no reason why the general rules respecting transfer of possession relating to the law of sales should not govern. The retaining of possession by a vendor is a circumstance of suspicion, but is open to explanation.

So in Hilliard on Sales, 42, it is said that a person may become equitably entitled to the benefit of a contract without any formal assignment or transfer by delivery.

In his charge to the jury the court again expressly charges them that they cannot look to the evidence admitted as to the transfer of the note, upon the question of its existence, and correctly instructs them as to the quantum and character of evidence necessary to sustain plaintiff's claim upon a lost note under the plea of *non est factum*..

The court further instructed the jury, that if F. G. Ross gave the note to Alfred Ross for the express consideration that he (Alfred) would pay the Boring note,

upon which Alfred was security for F. G. Ross, such agreement would pass the title to Alfred without actual delivery; that it would be a valid contract between the parties. But if the agreement was that Alfred would at some future time pay the Boring note, and F. G. Ross was then to transfer the note, or if he promised to let him have the Boring note as collateral security, the title would not pass. We are of opinion, that the foregoing instructions were in all respects correct, and fairly presented to the jury the controlling questions raised by the evidence, and that the conclusions of the jury upon the several questions thus submitted to them, are sustained by the evidence.

Upon the whole case we are of opinion that there is no error in the record. The judgment will be affirmed.

Judge TURNEY was incompetent, and did not sit in the case.

W. E. Beadles and Wife v. J. C. & S. M. Alexander.

1. Will. *Evidence.* It is admissible to prove the statement of the testator that he signed the will in the presence of the subscribing witnesses.

2. Same. *Evidence. Act of* 1869–70 *construed.* Under the act of 1869–70, T. & S. Code, sec. 3813, *a*, *b*, *c*, *d*, the devisees and legatees under the will are competent witnesses to prove the declarations of the testator.

3. Same. *Evidence. Presumption.* When the fact that the signature of the subscribing witnesses are genuine is established, and nothing else appears, the presumption that the attestation was in the presence of the testator is conclusive. But if there be positive testimony on the subject by the subsceibing witnesses or otherwise, it then becomes a question for the jury to settle upon all the evidence.

FROM WILSON.

Appeal from the Circuit Court. W. H. Williamson, Judge.

Jordan & Jas. F. Stokes for plaintiff.

Tarver & Golladay and B. T. Tanner for defendant.

McFarland, J., delivered the opinion of the court.

This issue *devisavit vel non*, was made up to test the will of John Alexander. It contains a devise of lands, and the question was, whether it was duly executed in the presence of two subscribing witnesses, as required by the statute. The paper was produced and the names of A. A. Massey and John W. Jacobs appear as subscribing witnesses. It was proven that

Massey was dead and that his signature was genuine. Jacobs was introduced as a witness, and he testified that his signature was genuine, but he gives it as his best recollection that the testator was not present when he signed the will as witness. He says the will was brought to a certain beech log school-house where he was teaching school, by James Simms, and at the request of Simms, he (Jacobs) and Massey, signed it as witnesses, but according to his recollection the testator was not present.

The proponents thereupon undertook to establish by other testimony, that the testator was in fact present at the time. Here was proof to show that Simms, who had since died, had testified on a former trial that he wrote the will but was not present when it was executed. Several witnesses proved statements of the testator to the effect that Simms had written the will and that he himself had taken it to the beech log school-house and there executed it in the presence of Massey and Jacobs, who witnessed it at his request. These statements of the testator were objected to, and the question is, were they properly admitted? After careful consideration we are of opinion they were. It is true it is laid down in Redfield on Wills, as the result of the authorities, that statements of the testator, not parts of the *res gestæ* and not showing the state of the testator's mind, but statements introduced merely to establish a particular fact by the force of the admission, are hearsay testimony and not admissible.

But a *prima facie* case arises upon proof of the

handwriting of the subscribing witnesses, and it is conceded that when the subscribing witnesses fails to prove the due execution of the will by the testator, that they may be contradicted or impeached and the fact established by other testimony. The statements of the testator to this direct point do but most strongly establish the fact. They do not stand as mere hearsay declarations of other parties. They are the declarations of the testator as to his own acts, and about which he must certainly know, and in general he has no motive to speak falsely, and both parties claim under him, one as devisee or legatee, the other as distributee and heir. His declarations are not introduced to establish the particular fact, by force of the admission or statements alone, but for the purpose of corroborating and supporting the presumption arising from the fact that the will bears the genuine signatures of two competent subscribing witnesses, and to contradict the testimony of the witness who, although he admits his signature, yet denies the testator's presence. It was held in North Carolina in three cases, that the statements of the testator are admissible generally, not merely as parts of the *res gestæ* or as showing the state of the testator's mind, but because they are the declaration of the only party having a vested interest to declare the whole truth, where all made the will and all could destroy it, and in either case the rights of no one else was affected. See *Reel* v. *Reel*, 1 Hawk., 248; *Howell* v. *Barden*, 3 Dev. & Bat., 442, and *Hester* v. *Hester*, 4 Dev. & Bat., 248.

We hold that the circuit judge did not err on this question.

The next question is, whether the devisees and legatees under the will were competent witnesses to prove declarations of the testator. It is not insisted that our recent legislation makes them competent *subscribing witnesses.* The law as to subscribing witnesses remains as before, but the question is, may they be examined as other witnesses. This depends upon the construction of the act of 1869–70, T. & S. Statutes, sec. 3813, *a*, *b*, *c*, *d*. The first section enacts that in all civil courts no person shall be incompetent to testify because he or she is a party or interested in the issue to be tried. The exception is in the next section, as follows: "In actions or proceedings by or against executors, administrators or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to the transaction with or statement by the testator's intestate or ward, unless called to testify by the opposite party, or required to testify thereto by the court."

We hold that this case does not come within the exception; that it is not an action by the executor, in which judgment could be rendered for or against him in the sense of the above statute, but is a contest between the devisees and legatees on the one side, and the heirs and distributees on the other, and that the witnesses were competent, and the court, therefore, did not err in admitting them.

The spirit and meaning of the above statute is,

that in a suit between the estate of a deceased person and a living party, that the latter shall not be allowed to give his version of the transactions with or conversations of the deceased, whose lips are closed. This in principle does not apply to the present case, where both the devisees and heirs are living and compelled to testify for themselves.

In his Honor's charge to the jury there are certain passages excepted to, as follows: If this witness, Jacobs, says that he signed the paper as a witness, then the law presumes that he did so at the request of the testator in his presence; if he says he signed the paper not in the presence of the testator and at his request, this will weaken the presumption as to him; and if he says that he and Massey both signed, but not in the presence of the testator and at his request, that will weaken the presumption that arises from the proof of Massey's handwriting as well as his own, and then presumption will be affected and weakened in proportion to the value and weight of the testimony of Jacobs. If Jacobs admits his handwriting but denies that he attested the paper in the presence of the testator and at his request, this conflict between his testimony before you and the presumption from proof or admission of his handwriting will affect his credibility as a witness, and diminish the value of his testimony.

The court then proceeds to instruct the jury, that the plaintiff, as to Jacobs, is not bound by the rule that a party cannot impeach his own witness.

We think the above extract of the charge is too

strong in this, that it conveys the idea that the presumption of law that the testator was present when the will was inspected, which arose upon the admission of Jacobs that his signature was genuine, was still controlling, notwithstanding Jacobs' testimony upon the subject; that Jacobs' testimony only weakened the presumption, and as he testified to a fact, contrary to the presumption of law, that his credibility was thereby affected.

It is only in the absence of positive testimony on the subject that the presumption of law is controlling. When the fact that the signatures of the subscribing witnesses are genuine is established and nothing else appears, the presumption that the attestation was made in the presence of the testator is conclusive; but if there be positive testimony on the subject by the subscribing witness or otherwise, it then becomes a question for the jury to settle upon the evidence. And while the jury may take into consideration the improbability that a witness would attest the will in the absence of the testator, we are not prepared to say that the fact that witness proves that he did sign his name in the absence of the testator, goes to impeach his credit and to show that he was unworthy of belief. The credit due the witness should be left to the jury to determine, as in all other cases.

For this error the judgment should be reversed and a new trial awarded.

H. H. AYRNETT, Clerk, etc., v. E. EDMUNDSON, Trustee.

MERCHANT'S TAX. *Merchant. Trustee to sell.* A trustee to whom goods are assigned, and who sells them from the store, but without replenishing the stock, is not a merchant, within the meaning of the law, so as to be bound to take out license or pay tax in order to sell the goods.

FROM GILES.

Appeal from the Circuit Court. JNO. V. WRIGHT, Special Judge.

HEISKELL for plaintiff.

J. & W. H. MCCOLLUM for defendant.

DEADERICK, C. J., delivered the opinion of the court.

Ayrnett, the clerk of the county court of Giles county, insists that Edmundson, trustee of Brown, is liable for a merchant's tax, and they, upon an agreed state of facts, submitted the question to the Hon. John V. Wright, circuit judge, who decided in favor of defendant, and Ayrnett has appealed to this court.

The facts are, that J. R. C. Brown was a merchant in Pulaski, February 19, 1877, and then engaged in selling dry goods, groceries, etc.; on that day he assigned all his stock of merchandise to Edmundson, as trustee, to sell the same and pay on debts due from Brown.

No authority was given to the trustee to replenish the stock, but he was directed by the deed to sell as rapidly as he could and pay over the proceeds to creditors. The trustee took possession of the goods in the house in which Brown had kept them, and has been selling them at private sale for cash, and has added nothing to the stock. Brown's taxes were paid up to the time he made his assignment.

In this case Edmundson is a trustee, to whom a failing debtor, for the benefit of his creditors, has made an assignment. Amongst the property assigned is a stock of goods. While he was trading and dealing in dry goods and groceries, Brown was a merchant, within the meaning of the law, but upon his assignment he ceased to be a merchant; nor did the transfer to Edmondson of the stock of goods, charged with the trust of turning them into money to pay debts, make him a merchant within the meaning of the law, so as to be bound to take out license or pay tax before he can sell the assigned property. The trading and dealing in goods, wares and merchandise imply not only selling but buying to sell, as an avocation or business.

This is very different from undertaking, as a trustee, to convert an insolvent debtor's assigned effects into money for the benefit of his creditors. A trustee in such a case is not a merchant, or liable to be taxed as such, and it makes no difference whether the effects assigned are goods, wares and merchandise, or any other property.

The judgment will be affirmed.

VIOLET L. WADE, by next friend, *v.* L. B. WADE *et al.*

HOMESTEAD. *Possession.* Renting out land, or farming it upon shares without living upon any part of it, though residing in a house adjoining the same, is not a possession of said land as a homestead, and does not give the homestead right.

Code cited: Sec. 2114*a*.

FROM RUTHERFORD.

Appeal from the Chancery Court. A. S. MARKS, Chancellor.

E. D. HANCOCK for complainant.

AVENT & CHILDRESS for defendants.

DEADERICK, C. J., delivered the opinion of the court.

In March, 1874, defendant, L. B. Wade, made a deed in trust, conveying a tract of 211 acres of land in Rutherford county, to secure certain creditors named in the deed. The wife did not unite in the conveyance.

The trustee was about to sell the land according to the terms of the deed, when complainant, the wife of defendant, L. B. Wade, filed her bill to enjoin the sale and have her right or her husband's to a homestead in the land declared and established.

The bill shows that there was no dwelling-house upon the 211 acres, and that the complainant and her husband never in fact lived upon the land, but at the time of the execution of the trust deed and ever since, they lived upon a lot and in a house adjoining the 211 acre tract, belonging to the sister of defendant, L. B. Wade; that the 211 acre tract was rented or farmed upon the shares, said L. B. furnishing horses, etc., and taking part of the products of the land.

The defendants demurred to the bill, upon the ground that the facts stated did not authorize the relief prayed for. The chancellor sustained the demurrer, and complainant appealed.

The Code, section 2114*a*, provides that a homestead in the possession of the head of a family, etc., to the value of $1,000, shall be exempt from sale under legal process, and shall not be alienated by the husband without the consent of the wife.

But the 211 acres conveyed by the husband was never in his possession, as a homestead. He did not occupy it as a home, and the renting it out without living upon any part of it, cannot confer the right secured by the Constitution, and the statute passed pursuant thereto.

The demurrer was properly sustained by the chancellor, and the decree will be affirmed.

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3. *Evidence. Code, sec. 3813d, allowing a party called by the court to testify, unconstitutional.* Sec. 3813*d* of the Code, allowing a party, in suits by or against executors, etc., called by the court, to testify, is unconstitutional and void. *Tillman* v. *Cocke*, 429.

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1. *Bank not liable for acts of cashier. When.* Answering questions as to the solvency of parties is no part of the business of a cashier of a bank, nor fairly included within the scope of such business. It may be, and probably is an incident of such position, but not an incident to it. *Held*, no liability attaches to the bank in such case. *Horrigan* v. *Bank*, 137.

2. *Guarantor released by conduct of holder. When.* When the holder of paper has given credit to a third party upon the recommendation of a cashier of a bank, and the debtor is ready and offers to pay the note at maturity, and the holder instructs the cashier to give the

BANKS AND BANKING - *Continued.*

debtor an extension of time, which the debtor accepts, and then fails, the cashier, though he had rendered himself liable by the recommendation, is discharged by the release of the holder. *Id.*

BANKRUPTCY.

Fraudulent conveyance. Judgment. A, having made a fraudulent conveyance of his real estate, was afterwards sued by B. During the pendency of the suit, A filed his petition in bankruptcy, and obtained his discharge before judgment was had against him. Afterward, B filed a bill to set aside the fraudulent conveyance, and to subject the property to the payment of the judgment against A. *Held*, that the discharge in bankruptcy was no bar to the proceeding. *State* v. *Williams*, 64.

BASTARDY.

Defendant not entitled to the benefit of reasonable doubt. Bastardy cases are in the nature of civil redress, although the form of enforcing the remedy is by a State proceeding. Notwithstanding this fact, the defendant is not entitled to the benefit of the doctrine of reasonable doubt, applicable in criminal cases. *Stovall* v. *State*, 597.

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See CHANCERY PRACTICE, 6; CHANCERY SALE, 1; BANKS AND BANKING, 2; GARNISHMENT, 1; MARRIED WOMEN, 12; PRINCIPAL AND SURETY; SUBROGATION, 1; SURETY, 1, 2.

1. *Seal. Obliteration of. Evidence. Alteration of written instrument. Principal and surety.* The erasure of a seal under the circumstances of this case, was such an alteration as changed the legal character and effect of the instrument, and was therefore material, and released the surety upon the same. *Organ* v. *Allison*, 459.

2. *Same. Same.* It is not necessary to release the surety that the alteration should be made by the party entitled under it, or the payee or holder thereof. *Id.*

3. *Same. Same. Presumption of law.* If it appears from the face of the writing that a seal was annexed to the name of N. & S. Ward, and there are grounds of suspicion that said seal has been erased, the burden of showing when the same was made, the person by whom made, and the intent with which it was made, is upon the plaintiff. As to whether there was a seal, and whether the mark after their name is an erasure, are questions of fact for the jury to determine; if they should think such mark was a mere blot, put there by accident, or a stranger, it would not be an alteration. *Id.*

4. *Condition. Default. Whole sum due. Waiver. Maker's rights.* A stipulation in a promissory note, bearing interest payable annually, that

upon a failure to pay interest annually the note shall be due, is a provision for the benefit of the payee, which he may waive, and cannot be taken advantage of by the maker of the note. *Wall* v. *Marsh*, 438.

5. *Title. Evidence.* The title to a promissory note may be passed without delivery of the note. Evidence was permitted to go to the jury, tending to show a transfer of the note, which was supposed to be destroyed by fire, with instructions from the judge that they were only to consider it as showing a transfer of the note, and not the fact of its existence; *held*, not to be error. *Gregory* v. *Ross*, 599.

6. *Parol testimony. Statute of limitations. New promise to third party. Sufficient, when.* The words, "par bank notes," have a fixed signification in commercial parlance, which cannot be varied by parol testimony. Under a replication of a new promise to pay a debt barred by the statute of limitations, evidence of admissions or promises made to a stranger, is only admissible when it appears the debtor intended they should be communicated to the creditor. *Bachman* v. *Roller*, 409.

7. *Mortgage. Renewal of note secured by.* If a mortgage is given to secure a note, and at the maturity of the note it is renewed, the renewal does not release the mortgage, unless such is clearly shown to be the intention of the parties. *Lowe* v. *Messenger*, 393.

8. *Foreign. Administration. Comity of States. Domestic creditors.* The administrator in the jurisdiction where negotiable notes are *left* at the death of the decedent, has title to them, notwithstanding the debtor resides in another jurisdiction where there is an ancillary administration; and the administrator in the jurisdiction of the debtor's residence has no title or right to control them, unless they actually come to his possession. *St. John* v. *Hodges*, 334.

9. *Principal and surety. Demand and protest. Days of grace.* Where a statute does not allow grace upon a note, a protest upon the last day the note has to run is good, and will bind the endorsers. Though the maker has all of this day in which to pay the note, yet it is the day of the note's maturity, and demand may be made before the close of the day. *Garland* v. *West*, 315.

10. *Same. Same Pleading and Practice Evidence.* Where the declaration avers, in general terms, that the note was presented "at maturity" and payment demanded, etc., and upon this there is a plea denying the demand, etc.: *Held*, that, under sec. 2939 of our Code, evidence may be introduced to prove the statute of another State, where the note fell due, as to the days of grace, demand and protest, etc., allowed in such State. *Id.*

11. *Usury. Contracts. Pleading and practice.* Where a bill of exchange, bearing twelve per cent. interest from maturity, purports to have been made in Mississippi, where such a stipulation would be valid,

the bill will not be void on its face in contracting for usurious interest, and will give the holder *prima facie* right to recover. But it may be shown by proof to be a Tennessee contract, and subject to the interest laws of this State. Such violation releases the debtor from all interest in excess of six per cent. simply. *Richardson* v. *Brown*, 242.

12. *Same. Same.* Under secs. 1 and 2 of the act of 1869–70, whether the sum above the legal rate is contracted to be paid before, at the time the note falls due, or after it is due, is equally a contract for a sum of interest above the rate allowed by law, and is usurious. *Id.*

13. *Assignment of. Evidence. Pleading and practice. Magistrate.* Where a party sues upon a note that has been assigned to him, it is necessary that he should prove the assignment, if contested, in order to establish his claim to the paper sued on; yet such assignee will not be required to prove the assignment unless it be denied by plea. If the suit originates in the circuit court, the plea should be in writing; if before a justice of the peace, the plea may be oral, either before him or on an appeal to the circuit court. *Blackwell* v. *Fitzpatrick*, 218.

14. *Principal and surety. Negotiable paper transferred as collateral security.* Negotiable paper transferred as collateral security for subsisting indebtedness and future advances, is subject to all equities then existing, and the maker is protected if he has paid the note to the rightful holder before the transfer, though the transfer was before maturity. *Richardson* v. *Rice*, 290.

15. *Negotiable paper. Innocent holder.* Where an innocent holder of a note purchased the same for value before maturity, though the endorsement be unauthorized or forged, he gets a good title to the paper freed from all equities, if he had no notice of the defect in the title of the holder. *Duke* v. *Hall*, 282.

16. *Deed of trust. Mortgage. Registration.* A conveyance of negotiable paper, or chose in action, by mortgage or deed of trust, need not be registered. *Id.*

17. *Principal and surety. Evidence. Parol, admissible to show the meaning of an endorsement.* The defendant, Jobe, endorsed the note in controversy to W. D. McCallum, who transferred the same to the plaintiff, Mary A. At the time the note was purchased by W. D. McCallum, the defendant, Jobe, had a mortgage upon valuable real estate to secure it. Upon the same property W. D. McCallum had foreclosed a subsequent mortgage of his own, and became the purchaser himself, and was in the possession under a deed from the trustees. It is alleged as error that the court below, over the objections of the plaintiff, admitted the testimony of the defendant to the effect that when he sold and endorsed the note to W. D. McCallum there was a distinct understanding between them that McCallum was buying to relieve his property of this incumbrance upon it, and that the de-

BILLS AND NOTES—*Continued.*

fendant was in no manner to be held liable, and that McCallum was to be substituted to all of Jobe's rights under the prior mortgage, which was a full indemnity and consideration to McCallum for his outlay for the note. *Held*, in such a case the testimony was properly admitted. *McCallum* v. *Jobe*, 168.

18. *Same. Mortgage. Debt merged by operation of law.* By operation of law the debt was merged and extinguished, and there can be no recovery on the note. In such a case the sale of the note carried the security with it, and no paper title was necessary to invest the purchaser with all the benefits of the mortgage. *Id.*

CHANCERY PRACTICE.

See JUDGMENT AND DECREES, TRUSTEES, 2; STATUTE OF LIMITATIONS, 5; SUBROGATION, 1

1. *Multifariousness. What is.* A bill is multifarious when several matters of a distinct nature are complained of against divers defendants, or a bill that unites against a single defendant several distinct matters. The court must look to the circumstances of each case to avoid multiplicity of suits on the one hand, and inconvenience to defendant and confusion of evidence on the other. *Miller* v. *Harris*, 101.

2. *Principal and surety. Guardian and ward. Administrator. Insolvent estate.* A bill for an account may be maintained against a surety of a deceased guardian, without making the administrator a party, where the insolvency of the guardian is alleged. *Parker's Heirs* v. *Irby*, 221.

3. *Same. Same.* If the interest sought to be reached by the bill so filed is for the benefit of a distributee of the deceased ward, the complainant must pursue his right through that person's representative *Id.*

4. *Administration. Administrator in collusion with debtor.* If the administrator collude with a debtor of the estate, not to collect a debt from or to recover assets from him, a creditor or distributee of the estate may file a bill to compel a settlement, making the administrator and such debtor defendants. *Haywood* v. *Currie*, 357.

5. *When bill should be rejected.* Though it should be regular and proper to sign a bill upon its face, still the same should not be dismissed for the mere irregularity of having been signed only on the back, such error being easily cured by signing under the direction of the court. *Litton* v. *Armstead*, 514.

6. *Same. Bill not to be dismissed. When.* Serving a defendant with *alias* subpœna to answer, issued after the lapse of several terms, is not a good ground for discontinuance of a bill in equity, though it is of a suit at law. *Id.*

CHANCERY PRACTICE—*Continued.*

7. *Petition to compel surety to pay money into court. Bills and notes. Principal and surety.* H was sued in the chancery court, and a fund belonging to him attached. H borrowed the fund, and gave bond with T. as security. H then loaned the fund to T, his surety, taking his note himself therefor. H subsequently filed his petition in the chancery court, stating that T was in embarrassed circumstances, and praying that he be required to pay the money into court. The chancellor made an order upon T, at chambers, requiring him to do so. Upon a petition for a supersedeas, filed in the supreme court to supersede the order of the chancellor: *Held*, that the order was improper, and that the money could not be collected from T in that way, it being due from T to H personally. *Harvey* v. *Hughes*, 556.

8. *Creditor by deed. Redemption. Deed of trust. Principal and surety.* A security upon a debt which is set out in a deed of trust, and who purchases the land at the trustee's sale, is not a creditor by "debt acknowledged by deed" within the meaning of the Code, sec. 2127, which permits such creditor and purchaser to advance upon his bid. *Settle* v. *Wendell*, 577.

9. *Assignment. Pendente lite. Court not bound to notice.* A court is not bound to notice an assignment *pendente lite;* and all interest of a complainant, under a decree in his favor, rendered after the assignment, will enure to the benefit of the assignee in such case. A complainant's want of interest in the subject-matter, by reason of such fact, at the rendition of the decree, will not avoid the same. *Wills* v. *Whitmore*, 198.

CHANCERY SALE.

Surety on notes. The surety on notes given for land bought at a chancery sale cannot be freed from his liability by averring or showing that his principal will not get a good title to the land bought. If the principal does not ask that the sale be set aside, the security cannot. *Lillard* v. *Puckett*, 568.

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CONSTITUTIONAL LAW.

See MANDAMUS, 5.

1. *Construction. Legislative power. Power to grant charters, with exemption from taxation.* The Legislature possesses inherently all legislative power, and the Constitution is to be construed as limiting or restricting, but not as granting the power. The power to grant charters of incorporation, with exemptions from taxation, binding upon the State, so that the charter, after acceptance, becomes a contract and irrepealable, falls properly under the head of legislative power. *Railroad Co.* v. *Hicks*, 442.

2. *Same. Constitution of* 1834 *did not restrict the power.* Section 28, of Article 2, of the Constitution of 1834, to-wit: "All lands liable to taxation, held by deed, grant or entry, town lots, bank stock, etc., and

CONSTITUTIONAL LAW—*Continued.*

such other property as the Legislature may, from time to time, deem expedient, *shall be taxable*," imposed no restriction upon the power of the Legislature to stipulate for total or partial exemptions from taxation in charters of incorporation. *Id.*

3. *Same. Sale of property. When it passes this immunity.* Under an act of the Legislature the State loaned its bonds to a railroad corporation, which by its charter was exempt from taxation; said act reserving a right in pursuance of which a subsequent act was passed, providing for the enforcement of the State's lien in a court which was expressly empowered to determine all questions touching the rights of the State, and all other parties. In a proceeding instituted by the State against said corporation, it was adjudged, in *pursuance of said act*, that a sale of the property and franchises of the company would vest in the purchasers with "all the rights, privileges and *immunities*" appertaining to the same. *Held*, that under the decree, immunity from taxation passed to the purchasers; that the State having provided for the adjudication of these questions, and the purchase having been made on the faith thereof, it cannot question the validity of the adjudication. *Id.*

4. *Mandamus against a State officer. Not maintainable. When.* A proceeding by *mandamus* to compel an officer of the State to do that which the Legislature has prohibited him from doing, is in effect a suit against the State, and was not maintainable prior to the act of 1855, (Code, sec. 2807), nor subsequently to the repeal of the act by the Legislature in 1865. It therefore follows that a tax collector cannot be required, by this form of action, to receive notes of the Bank of Tennessee, emitted after May 6th, 1861, in payment of relator's taxes, under the 12th section of the bank charter, enacted in 1838, in the face of legislative instruction to the contrary, even though the notes were issued during the time that sec. 2807 of the Code was in force, that section being considered as an ordinary act of legislation in regulating the jurisdiction of the courts of the State, and not such an act as would so incorporate itself with the 12th section of the bank charter as to constitute a part of the contract between the State and the holders of the notes. *State Ex rel. Bloomstein v. Sneed*, 472.

5. *Obligation of contracts. Not impaired by laws prohibiting receipt of new issue Bank of Tennessee notes for taxes.* There is no obligation on the part of the present State government to receive the notes of the bank issued after the inauguration of the rebel State government, in payment of the taxes due the State. For, although as between the bank and the holders, these notes are valid and protected from impairment through hostile State legislation, by the Federal Constitution, yet sec. 12 could only have been operative upon the bills or notes emitted during the existence of the illegal State government through the re-enactment or tacit recognition thereof, by such State government,

CONSTITUTIONAL LAW—*Continued.*

which had no power to commit the State to the terms of the contract imposed thereby for a period longer than its own existence. It was, therefore, competent for the restored State government to repudiate these notes, so far as its liability to take them for taxes was concerned, the guaranty of the illegal State government not having been under the protection of the Federal Constitution. *Id.*

6. *Taxation. Exercise of the power by the Legislature.* The power of taxation belongs to the State in its sovereign capacity. The exercise of the power is legislative. The Legislature has no authority to delegate this power except in such cases as the constitution authorizes. *Waterhouse* v. *Public Schools*, 398.

7. *Same. Same. May be delegated for educational purposes to county and municipal corporations.* The Legislature has the right under the Constitution, to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively, but can extend the power to no other corporation it might create, although its object be for educational purposes, which the Constitution declares shall be encouraged, because this is a subject upon which that instrument should receive a strict construction. *Id.*

8. *Same. Same. What will constitute a new corporation.* The corporation styled in this opinion as "The Board of President and Directors of the Cleveland Public Schools," is held to be a new corporation for educational purposes, not contemplated by the Constitution, although its offices are filled by the officers of another corporation, the city of Cleveland, its mayor and aldermen being, *ex officio*, "The Board of President and Directors of Public Schools," etc., and that such new corporation, consequently, has no authority to levy and collect taxes, assessed for school purposes. *Id.*

9. *Constitution. Art. II., Sec.* 18, *construed. Per Curiam.* "The evil intended to be remedied by this provision, is to prevent laws upon one subject being tacked on to a bill upon a wholly different subject, and in this way, sometimes elude the attention of the Legislature, and pass without sufficient consideration." *State* v. *Lanster*, 584.

CONTRACTS.

See ATTORNEY AND CLIENT; BILLS AND NOTES, 10, 11, 12; CONSTITUTIONAL LAW, 5; CORPORATIONS, 5, 6; DEEDS OF TRUST, 2; MARRIED WOMEN, 8; PUBLIC SCHOOL LAW.

1. *Against public policy. Void. When.* All contracts for services to be rendered in influencing public officials to grant to particular persons control of business operations of the government, are void as against public policy. *Newman* v. *Davenport*, 538.

'CONTRACTS—*Continued.*

2. *Use of machine. Patent right.* The use of a patent machine does not necessarily imply, in the absence of a contract, that the patent is to be paid for. *Mayor* v. *Hagan*, 495.

3. *Evidence. Statute of frauds.* It will be competent to seek to establish plaintiff's contract, to be responsible to his principal for goods credited by him as a clerk, by evidence showing that other clerks had entered into a similar obligation, and had actually paid for articles so sold. Such a contract if made is not in violation of the statute of frauds by the clerk becoming responsible for the debts of another, under the conditions of the contract. *Guggenheim* v. *Rosenfeld*, 533.

4. *Consideration implied. When.* The making of a contract, implies a consideration, and the charge of taking a contract imports *ex vi termini*, an agreement to do on a sufficient consideration. *State* v. *Keeton*, 559.

'CORPORATIONS.

See CONSTITUTIONAL LAW, 7, 8; SPECIAL LEGISLATION.

1. *Municipal. Tax paid by reason of threats of litigation, etc. Not recoverable. When.* A tax paid by reason of threats of litigation or the apprehension of the levy of distress warrants, cannot on this ground be recovered, although the levy and tax was illegal, there being no fraud or mistake of facts, but only mistake as to legal liability. A State or city may and ought to refund a tax so paid. *Lea* v. *City of Memphis*, 103.

2. *Same. A city is contracting party, and not agent. When.* In a matter of taxation the city is contracting party and not the agent of the tax payers. *Id.*

3. *Same. Certificate of indebtedness. Issued by city. Valid. When.* A certificate of indebtedness issued by a city, upon its own ordinance, to individuals, who have paid illegal assessments, are valid and binding obligations against the city, and founded upon a valid consideration. *Id.*

4. *Same. Same. Issued by the city of Memphis receivable for taxes. When.* The certificates of indebtedness issued by the city of Memphis in 1873, were receivable for taxes on account of "Nicholson pavement," for the years 1873–74–75, from those who had paid the original assessment to Brown, but while this was so, a State court would not interfere with the special "mandamus tax" levied under the mandate of the U. S. Court, as this would be in effect to defeat the execution of the order of said court. *Id.*

5. *Same. Liability of. Power of Committee to bind corporation. Water-works. Improvement.* The power to make a contract for the introduction of a new and expensive improvement in a system of water-works,

being equivalent in general to the power to levy, collect and disburse taxes, must be exercised in the same manner and by the same authority, that is, by a corporate act. There being no general law or ordinance modifying this rule, a water-works committee had no power to bind a corporation by a contract of this character. *Mayor* v. *Hagan*, 495.

6. *Same. Same. Ratification of contract by city government.* The court below instructed the jury that the failure of the city authorities within a reasonable time to disaffirm what the committee had done, would be a ratification; and refused to charge, that the ratification could only be by the action of the two boards of aldermen and councilmen, approved by the mayor, and that the mayor and members could not commit or estop the city by any conduct or expressions of the water-works. *Held*, error.

7. *Same. Same. Power and means of collecting taxes under act of* 1873, *ch.* 102, *etc.* The city of Memphis filed a bill under the act of 1873, ch. 102, to which objection was made by demurrer, that the bill alleges lands and lots had been sold for taxes and bid in by the complainant, and points to no defect of title under the proceeding for sale; that, according to the allegations of the bill, complainant has acquired a perfect title, and her remedy is by an action of ejectment. *Held*, the act of 1873 gives the chancery court jurisdiction to evict persons from land in behalf of a corporation, that has bid the same in, at the prices of the taxes due thereon. *City of Memphis* v. *Looney*, 130.

8. *Same. Same. County commissioner need not be party. When.* The power given to the county commissioner to sue is merely cumulative to that of the corporation already vested by law. It is not necessary that the suit should be brought in his name. *Id.*

9. *Same. Same. Statute of limitations.* It is not in the power of the corporation to relieve one and impose upon another a burden, and no laches on its part, or that of its officers, can defeat the right of the public to have collected and rightfully appropriated the public taxes. As against this right, there is nothing of such a character that justice requires an estoppel, or limitation should be asserted. *Id.*

10. *Railroads. Crossing streets with connecting line. Nuisance. Eminent domain. Secs.* 1118, 1119 *and* 1120 *of the Code construed.* Sec. 1118 of the Code provides that "all the railroads of the State have power to construct their roads so as to cross each other, if necessary, by the main tracks or branches, or to unite with each other as with branches." *Held*, that the plain meaning of this section, read by the light of secs. 1119 and 1120, was that various roads might form a homogeneous system, and that these roads, or any future roads, might unite by building tracks from one to the other for the purpose of transporting loaded cars. *Railroad Companies* v. *State*, 522.

CORPORATIONS—*Continued.*

11. *Same. Same. Power of railroad companies.* This power being conferred on corporations which had built, or were empowered to construct roads, and had already the power, in so doing, to exercise the right of eminent domain, and to purchase land for the purposes of the tract, needed no additional power to be conferred in order to carry out the objects of the Legislature. *Id.*

12. *Same. Same. Necessity of sec.* 1119. It was necessary to authorize them to build further in order to make the connection contemplated, but they possessed the power already to carry out the work authorthorized. *Id.*

13. *Municipal. Power to purchase land.* While it is the better rule to construe strictly the power of corporations, still it was within the corporate powers of the city of Knoxville to purchase and own land outside the city limits, for water reservoir purposes. *Newman* v. *Ashe*, 379.

14. *Same. Title not divested by change of purpose.* Land being purchased for such a purpose, the title vested in the city, and was not divested by a change of purpose. *Id.*

15. *Same. Failure to perform a minor consideration will not forfeit the title. When.* Land conveyed for a fair consideration does not revert to the bargainor because some outside consideration has not been performed, when there is nothing in the deed to show that such failure was, by the contract, to forfeit the title. *Id.*

16. *Same. Ejectment. Right to re-enter. Who may.* The right to re-enter is reserved to the bargainer and his heirs, and not to his grantees. *Id.*

COSTS.

See CRIMINAL LAW, 1, 2, 3, 12; OFFICE AND OFFICERS, 2, 4, 5; PERSONS UNDER DISABILITY, 2; STATUTES.

COUNTY COURT.

Suggestion of insolvency. Can only be made in county court. Per Curiam. We held at the last term, in the case of Bryant v. Campbell, that by statute, suggestion of insolvency can alone be made in the county court. But treating the suggestion as a nullity, under a bill for the administration of a complicated estate, with all parties in interest before the court, they will be bound by a decree apportioning the fund among them upon principles of equality. *Belcher* v. *Wickersham*, 111.

COUNTY WARRANTS.

For a purchaser of county warrants to maintain suit in his own name, he must be vested with title to same by written endorsement or assignment. *Bradley* v. *Surgoine*, 407.

CRIMINAL LAW.

1. *Fees. Costs. District Attorney.* Previous to the act of 1875, the district attorney-general was allowed a fee of $5.00 in misdemeanors where the costs were paid or secured by the defendants, but in no case where the county pays the costs in a misdemeanor, was a fee of more than $2.50 allowed. The act of 1875 provided for defendants being compelled to work out the costs, when they failed otherwise to pay or secure them; by the 11th section it is provided, that the county shall pay all the costs in misdemeanor cases, as now, and the proceeds of said convict's labor shall be paid into the county treasury. Though the attorney-general be entitled to a fee of $5.00, where the convict pays or secures the costs, and though the convict reimburses the county with the proceeds of his labor, and thereby indirectly pays the cost of his trial, yet the court hold, the attorney-general is entitled to a fee of only $2.50 under the partial provisions of Sec. 4515 of the Code, and the convict cannot be compelled to "work out" any greater amount. *Knox* v. *State*, 202.

2. *Same. The convict bound only for State costs.* Although the defendant be liable to judgment for his costs, he cannot be held in custody until he pay or secure the same; he is only bound for costs on behalf of the State. *Id.*

3. *Same. Chapter 83 of act of 1875. Void.* The act of 1875, ch. 83, which provides that the convict be further held in the work-house, after working out the imprisonment affixed by the jury, and all the costs in the case to work out; "also all costs which may accrue after conviction, for clothing and other necessaries," considered by the court to be in violation of the 8th section of the bill of rights, which declares that no man shall be taken or imprisoned, etc., or deprived of his liberty, but by the judgment of his peers or the law of the land; this chapter is held by the court to be void. *Id.*

4. *Bail. Surety. Clerk's power to arrest defendant.* A clerk of the court is not authorized to direct the arrest of a defendant, where he has been released on giving security, or to direct his imprisonment in the county jail as a means of collecting a judgment rendered against him and his surety. *Poteete* v. *State*, 261.

5. *Resisting arrest. Office and officer.* A *mittimus* issued by the clerk of a court improperly and in violation of law, and directing the sheriff to arrest and imprison the party named, will not justify the officer in attempting to make the arrest; and the resistance of the party by killing the officer does not amount to murder The officer must, at his peril, see that he has valid process in his hands to authorize an arrest. *Id.*

6. *Evidence. Severance. Competent witness.* A party jointly indicted for the same offense, but who has obtained a severance, and is not put on joint trial, is a competent witness for defendant. *Id.*

7. *Same. Dying declarations.* The dying declarations of a witness to a homicide are not admissible in evidence. Only such are admissible as are made by him for whose homicide the prisoner is on trial. *Id.*

8. *Ministerial acts. When not invalid.* An indictment for a felony against a party, the filing of a plea of "not guilty" thereto, and the order of the judge to spread the indictment upon the minutes of the court, are mere ministerial acts, in no wise affecting the interest of the accused. Such proceedings are therefore not invalid, because had while a judge was presiding, incompetent to sit upon the trial of the cause. *Glasgow* v. *State*, 485.

9. *Same. Failure to spread indictment upon minutes does not invalidate the cause.* Nor does the omission to have spread the indictment upon the minutes of the court either enlarge or diminish the rights of the accused, since the object of such a proceeding is simply to provide against the consequences of the loss, abstraction or destruction of the original. *Id.*

10. *Same. Appointment of special judges. Authority for must be strictly pursued. Consequences of omission so to do.* In the appointment or selection of special judges in criminal cases, the law authorizing it must be strictly pursued. Neither does the Constitution nor any statute of the State provide for the appointment of a special judge, in such a case, by the agreement of the parties. The verdict and judgment rendered, while a special judge so appointed was presiding, are therefore held void, the prisoner declared never to have been in jeopardy, and remanded for trial *de novo*. *Id.*

11. *Kuklux law. Section 4770 of the Code construed.* The prisoner was indicted under Section 4770 of the Code and convicted. The indictment reads as follows: "The defendant on the 5th day of November, A. D., 1877, in the county and jurisdiction aforesaid, then and there unlawfully and feloniously being masked and in disguise, unlawfully and feloniously then and there did enter upon the premises of Ellis Davis, in said county situate, against the peace and dignity of the State." The facts were, that the prisoner entered the hen-house of the prosecutor, for the purpose of stealing chickens, as acknowledged by himself. *Held*, that the indictment was proper and the conviction correct. *Walpole* v. *State*, 370.

12. *Fine and costs. Bond and security for. Remedy.* Where a person has been convicted and fined, and the court accepts his surety given for the same, and he is thereupon released, he cannot be rearrested at a subsequent term, upon the failure of the sheriff to make the money, and remanded to prison again. The court say: Where security is accepted by the court and defendant discharged, there being no fraud practiced, the remedy is upon the bond or recognizance for the fine and costs. *Hamilton* v. *State*, 355.

CRIMINAL LAW- -*Continued.*

13. *Venue. Property taken in one county but carried into another.* The defendants in this case were, at the time they committed the offense, prisoners and in charge of an officer, who was taking them to Memphis from Jackson, where they had been tried and remanded to Shelby county for rehearing, and when in Fayette county, on their way, they took from the person of the prosecutor his watch, and carried it to Shelby county. *Held*, that they were properly tried in Shelby county for this offense, as they knew they were certainly going to Shelby county, under the circumstances, and the carrying of the goods to that county, in such case, was not involuntary. *State* v. *Margerum*, 362.

14. *Same. Bringing stolen property into this State. Infamy.* A person may be convicted, under the act of 1875, ch. 31, for bringing stolen property into this State, but the judgment of infamy cannot be prescribed as part of the punishment. *Foster* v. *State*, 353.

15. *Embezzlement. What necessary to constitute. Principal and agent.* In order to sustain the charge of embezzlement, the agent, etc., must be in the regular employment of the master, and it must be by virtue of such employment that the money or property appropriated comes to his hands. A mere casual employment does not fall within the statute. *Johnson* v. *State*, 279.

16. *Keepers of hotels. Rights.* The 2d section of the act of 1875, ch. 130, which gives a right of action to the keeper of any hotel, theater, public house, restaurant or common carrier, against any person guilty of turbulent or riotous conduct, within or about the same, etc., does not violate Sec. 17, Art. II. of the Constitution, forbidding the passage of an act embracing more than one subject; nor is it in violation of the 16th section of the Bill of Rights, forbidding excessive fines and punishment. *State* v. *Lauter*, 594.

17. *Judgments and decrees. Nolle prosequi. Error to set aside. When.* A *nolle prosequi* was entered at one term of the court through mistake. During that term, in the absence of defendant, it was set aside, and the case reinstated on the docket. At the next term the defendant moved to set aside the order reinstating the cause, which was done. *Held*, this was error. *State* v. *Phelan*, 241.

18. *Previous opinion of grand jury. Does not disqualify.* The foreman of the grand jury that found the indictment in this case, was one of the committing magistrates; such fact was pleaded in abatement to the indictment, urging the incompetency of the grand juror, upon the ground that he had prejudged the case. The court say: "We do not understand that our laws require that the grand jurors shall be free from any previous opinion, as to the guilt of the accused." *State* v. *Chairs*, 196.

CRIMINAL LAW—*Continued.*

19. *Copy of indictment. Prisoner entitled to. In all cases. Not restricted to capital cases.* Prisoners in actual confinement are entitled to a copy of the indictment in all criminal prosecutions. This is not restricted, as would be inferred from sec 5209 of the Code, to capital offenses. The prisoner can waive the right, and if he does not demand it, such waiver will be implied. *Moses* v. *State*, 229.

20. *Dog subject of larceny. Statute construed.* Under the statute of interpretation, sec. 51, Code of Tennessee, a dog is personal property, and therefore, if of any value, is the subject of larceny. *State* v. *Brown*, 53.

21. *Burglary. Larceny.* A conviction for burglary with intent to commit larceny, is a bar to an indictment for commission of the larceny. *State* v. *DeGraffenreid*, 287.

22. *Misdemeanor. Attempted felony.* An attempt to commit felony, as larceny, is, at common law, punishable as a misdemeanor. *Nicholson* v. *State*, 258.

DEEDS OF TRUST.

See HOMESTEAD, 2, 3; CHANCERY PRACTICE, 7; VENDOR'S LIEN.

1. *Construed to merely retain a lien or mortgage. When.* A deed of conveyance containing the following clause: "Nevertheless, this deed of conveyance is null and void and of no effect until all the purchase money is paid, then of full force and effect," is construed to retain merely a lien or mortgage to secure the unpaid purchase money; a non-compliance with the conditions does not avoid it absolutely. *Miskelly* v. *Pitts*, 193.

2. *Equity. To have relief in, upon an allegation of want of title or breach of covenant of seizin. What requisite. Actions.* A party can have no relief in equity for the alleged breach of the covenant of seizin, or upon an allegation of want of title, no fraud or insolvency being charged, unless a clause in the deed changes its character from an executed to an executory contract. *Id.*

3. *Sale of land. Under after death of maker. Right to proceed not waived by judgment at law. Rights of parties.* The power of a trustee to sell land for the purpose of paying a debt, is a power to sell coupled with an interest, and is not revoked by the death of the maker of the deed. The creditor secured by the deed may proceed against the trust property as the primary fund, whether before or after the death of the debtor; and this right is not waived by obtaining a judgment at law. *Hodges* v. *Gill*, 378.

4. *Rights of beneficiary to attach rents of property conveyed to secure his debt, where trustee has only legal title without possession. Denied.* A trustee holding the legal title to land, under a deed of trust, to secure creditors, but not in possession, has no right to the rents, nor can the same be attached by a second creditor for the payment of his debt. *McCall* v. *Cawthorn*, 61.

DOWER.

See HOMESTEAD, 1, 2, 3.

EVIDENCE.

See BILLS AND NOTES, 1, 3, 5, 6, 10, 12, 13, 17: CRIMINAL LAW, 6, 7; CONTRACTS, 3; FERRIES, 2; FRAUD AND DECEIT, 5; MARRIED WOMEN, 7, 8; RAILROADS, 1; WILLS, 1, 2, 3.

Records of county court are. When. In courts of equity the records of the county court, when duly certified to and regularly filed as evidence, become such as much as a deposition or any other testimony. *Levisay* v. *Delp*, 415.

FEES.

See CRIMINAL LAW, 1; OFFICE AND OFFICERS, 1, 3, 5, 7; ATTORNEY AND CLIENT.

FERRIES.

1. *License. Injunction. Chancery Court. Has no power to protect parties possessing statute privileges and franchises. When. Statement:* The banks of the river are owned by different persons; both run a ferry and have the same landing; one with, the other without a license. *Held,* land may be appropriated to the use of a public ferry as an easement for the benefit of the public, but a person who runs a ferry under a license, has no such rights against third persons, who set up an opposition without license, as a court of equity can protect by injunction or otherwise. *Levisay* v. *Delp*, 415.

FIRE INSURANCE.

See MARRIED WOMEN.

FRAUDULENT CONVEYANCE.

See ATTACHMENT; BANKRUPTCY.

1. *Voluntary conveyance of property in fraud of creditors.* Norvell, Boone & Co., of Memphis, obtained credit from Brady & Co., in New Orleans, through one of their members (McKeon), upon the faith of his individual estate, which he promised should remain in his own name, and be subject to his debts: that soon afterwards McKeon made a voluntary conveyance of his property, when his firm was in doubtful circumstances, without warning Brady & Co., who continued the credit previously obtained. *Held,* such a conveyance is evidence of fraud, in fact, and the registration of the deed does not alter the case. The property so conveyed will be liable to the satisfaction of debts due such creditor, though contracted subsequent to the conveyance. A debtor has no right to convey all of his tangible property

FRAUDULENT CONVEYANCE—*Continued.*

and leave his creditors to take their chances of realizing their debts from assets, consisting of bills and accounts payable, where the proof fails to show that such assets were available to creditors. As the deed is void for fraud, in fact, all the creditors will be allowed to share the proceeds. *Levering* v. *Norvell*, 176.

2. *Same. Payment of debts. Does not rebut evidence of fraud. When.* Where a debtor makes a voluntary conveyance and afterwards pays a large part of his liabilities, this does not rebut the evidence of fraud. *Id.*

FRAUD AND DECEIT.

1. *Party making representations that afterwards become false. Not liable. When.* Horrigan applied to Thacher, the cashier of a bank, for information concerning the solvency of Toof, Phillips & Co.; Thacher replied favorably as to their credit, and upon this assurance plaintiff, from time to time, purchased large amounts of the bills of acceptance of said firm. Eight months later, Toof, Phillips & Co. failed, and plaintiff lost $2,000 by his investments; thereupon he brought suit against Thacher and the bank for deceit. *Held*, an honest statement of a mere opinion, however erroneous, as to the solvency or reliability of another, cannot furnish the grounds for an action of this character. A party cannot be held, in such a case, to have given a continuing guaranty against future contingencies, nor to have bound himself to notify the other of what he may well be assumed to be able to discover for himself. *Horrigan* v. *Bank*, 137.

2. *Same. Statement.* The substantial averments of the indictment are: "The plaintiff in error represented himself to be a practicing physician; that he had restored sight to Ned Williams, a blind man; that he represented to the prosecutor his house and residence were infected with poison; that the poison was in the bed occupied by the grand-daughter of the prosecutor, that the grand-daughter was the person poisoned. He proposed to find the poison and remove it for a valuable consideration to be paid to him by the prosecutor; the prosecutor, relying upon these false and fraudulent representations, and believing them to be true, paid to the plaintiff in error the sum of $22.00," etc., etc. *Held*, that the indictment is sufficient to sustain a conviction under section 4701 of the Code, supported by the facts of this case. *Bowen* v. *State*, 45.

3. *Same. Same.* It is insisted that the false pretenses complained of are not such as would be credited by a person of ordinary caution. The court say: "We are aware that such language is used in some of the cases passed upon by this court. This restriction upon the operation of the statute is not, in our opinion, authorized by its language. If ordinary caution is to have its influence in the application of the law, it must be such ordinary caution as we may naturally and

FRAUD AND DECEIT—*Continued.*

reasonably expect to exist under the circumstances and conditions in life of the person practiced upon. The question is, What caution is he capable of exercising? *Id.*

4. *Same. Same. Ledgerdemain.* It is insisted there is no proof showing the falsity of the claimed superhuman power of the pretender, and therefore he cannot be convicted. The court say: "We reply, the negative is not susceptible of actual proof, but is of that class of things which bear to the intelligent mind the conviction clear and conclusive of its own falsehood. *Id.*

5. *Same. Same. Evidence.* It was error not to withdraw the prosecutor's evidence to the effect that one of the patients of the pretender had told him that he was not benefitted, when the prisoner had stated to the prosecutor that he had cured him, etc., as evidence of his skill. *Id.*

GARNISHMENT.

See PERSONS UNDER DISABILITY, 3.

1. *Guardian and ward. Married women. Bills and notes.* A garnishment may set-off against a debt due by him, notes taken by his guardian, a *feme covert*, payable to her, as guardian, for moneys belonging to him, they having come to his possession upon majority. *Merriman v. Cannovan*, 93.

2. *Same. Same. Statute of limitations.* When the statute operates on the remedy it must be pleaded. An *ore tenus* defense is not admissible; if the notes were barred by the statute which it was not pleaded, the set-off will be allowed. *Id.*

3. *Same. Same. Trusts.* When a party borrows money from a trustee, without security, it is a breach of the trust, of which he has notice, and thereby becomes a quasi trustee himself, and is estopped from pleading the statute of limitations against the recovery of such a debt. *Id.*

GUARDIAN AND WARD.

See CHANCERY PRACTICE, 2, 3; GARNISHMENT 1; PERSONS UNDER DISABILITY, 3, 4.

HOMESTEAD.

1. *Dower. Widow not entitled to both. When. Administration.* Where a husband has died in 1869, the rights of his widow to homestead, etc., are determined by the act of 1868, which does not enlarge the widow's rights or interest in her husband's estate, as against the administrator. A homestead is not among the articles exempt from execution, which descend to the widow, and not to the administrator;

her rights to such are as the head of a family, against a creditor, who is seeking to enforce his debt, by execution or attachment. *Langford* v. *Lewis*, 127.

2. *Same. Same. Deed of trust. Mortgage. Power of married woman to alienate.* In construing a deed of trust by a husband and wife, containing the following clauses: "We hereby release and relinquish all right, claim, and interest whatever, in and to said lot of ground, which is given by or results from all laws of this State, pertaining to the exemption of homestead or dower," the court say: "Although we have no special statutes authorizing a *feme covert* to release her inchoate right of dower, yet we think she may convey or release this right under the same principle that our laws allow her to convey any other interest she may have in lands." The above language we hold to be sufficient. *Atwater* v. *Butler*, 209.

3. *Same. Same.* The court hold the following clause in a similar deed to merely convey the homestead interest, leaving the dower right unaffected: "And in the event of sale we waive all equity of redemption and re-purchase and homestead in said property." *Id.*

4. *Same. Debt contracted before passage of law. Statute of limitations. New promise after passage of law.* The statute of limitations operates *only* to bar the remedy; a new promise, therefore, is not the substantive cause of action, but the original debt. Hence, under the act of 1870, a homestead is not exempt from the payment of a debt contracted *before* its passage, although the bar of the statute has been completed, if the new promise is made *subsequently* thereto. *Woodie* v. *Towles*, 502.

5. *Same. Right of. Cannot prevail over vendor's and mechanic's lien. When. Such lien continues. How long. And may be enforced. How.* The homestead right cannot prevail over the lien given by the statute, in favor of one furnishing the material for the building on the lot claimed as a homestead, and this lien includes not only the buildings erected, but also the lot upon which they are erected, and continues for one year after the time at which the materials were furnished. The lien thus given by statute may be enforced by attachment either at law or equity. *Thompson* v. *Wickersham*, 216.

6. *Same. Possession.* Renting out land, or farming it upon shares, without living upon any part of it, though residing in a house adjoining the same, is not a possession of said land as a homestead, and does not give the homestead right. *Wade* v. *Wade*, 612.

7. *Same. Voluntary alienation of.* When a husband and wife execute a conveyance, and the same is acknowledged as required by law, they part with their right of homestead, although the deed may contain no *express* stipulation conveying the homestead. *Lover* v. *Bessenger*, 393.

HUSBAND AND WIFE.

See HOMESTEAD, 2, 7; MARRIED WOMEN, 1, 2, 3, 4, 7, 8, 10.

JUDGMENT AND DECREES.

See APPEAL; CRIMINAL LAW, 17; BAIL BOND; PLEADING AND PRACTICE, 4; REDEMPTION, 3; SUBROGATION, 2, 5.

Office and officers. Service of process. Chancery practice. A judgment cannot be vacated in chancery, on the simple, unsupported evidence of the judgment defendant, that he was not served with process, where the writ shows the officer's return, though he may not remember the fact of service. *Tatum* v. *Curtis*, 360.

LANDLORD AND TENANT.

1. *Emblements.* A tenant occupying premises under a lease not for a definite period, sowed a crop of oats in November, 1872, harvested them in 1873, and plowed in the stubble to get a new crop. His tenancy was terminated the first of September, 1873, without objection or reservation by him. *Held*, that he was not entitled to enter and gather the crop of oats in June, 1874. *Hendrixson* v. *Cardwell*, 389.

2. *Lien. For supplies furnished. Tenant, etc.* The act of 1875, ch. 116, gives the landlord a lien on the crop for necessary supplies of food and clothing furnished the tenant, without any written contract therefor. *Lewis* v. *Mahone*, 374.

LIFE INSURANCE.

Assignment of policy. During husband's life. A husband who has taken out a policy of insurance on his own life, payable in the usual form to him, his executors, administrators and assigns may dispose of the same by will. The provisions of the Code, secs. 2294 and 2478, directing that such a policy shall survive to the benefit of the widow and children, and shall not be subject to the debts of the husband, only apply when the policy remains undisposed of by the husband in his life time. *Williams* v. *Carson*, 516.

MANDAMUS.

See CONSTITUTIONAL LAW, 4.

Statement of case: Brown & Co. obtained judgment against the City of Memphis in the Circuit Court of the United States of West Tennessee for paving, etc., which court ordered a peremptory mandamus, compelling the city council to pass an ordinance levying a special tax to pay said judgment. A levy of fifty-four cents on the one hundred dollars was made in obedience thereto, which was construed also to apply, by the Federal Court, to merchants' capital, a number of whom filed a petition in the State Circuit Court at Memphis, praying

for a *certiorari* and *supersedeas* to bring up and have superseded the distress warrants against each of them, in the hands of the city tax collector for the collection of the special tax assessed against them severally, which they aver to be illegal upon two grounds; first, because the ordinance itself is illegal, the city government having no power under the charter and laws to levy the tax; second, because the amount of the tax is too large, since the assessment of their capital for the year, which was made under the act of 1873, violates the Constitution, and assesses their capital above the proper amount. *Merchants* v. *Memphis*, 76.

1. *Jurisdiction. Of State and Federal Courts. Is exclusive and independent.* Where a State or Federal Court has rightful jurisdiction of parties and the subject matter, it must be allowed to proceed to judgment and execution; their jurisdiction being exclusive and independent, process issuing from the one cannot be enjoined by suit in the other. *Id.*

2. *Arguendo. State court can take jurisdiction. When.* Cases might arise where the State court could take jurisdiction, that is, if the city was proceeding to collect a tax from property exempt, or to collect double the amount assessed, the taxpayer, without denying the legality of the levy, might have his remedy in a State court to avoid paying that which under the levy he was not bound to pay. *Id.*

3. *Mandamus. From Federal Court. Defense against by petition, with new parties. Must be made. Where. Not necessary for petitioners to have been parties to the original suit. Taxpayers are entitled to no notice, an ordinance levying a tax being legislative in character. The decision of a court ordering a mandamus has the effect of a judgment. When.* When a mandamus from the Federal Court orders a tax to be levied to satisfy its judgment, petitioners avoiding the payment of such tax have no relief in the State courts, since the jurisdiction to correct the judgment, or protect parties from its effect, must either be in the court rendering the judgment, or one having the revisory power upon writ of error. The question being the same, the State courts cannot take jurisdiction merely because the petitioners are new parties; it was not necessary that petitioners should have been parties to the original suit, since the act of adopting an ordinance levying a tax is not judicial, but legislative, in character, no notice to taxpayers is requisite to give it validity. The decision of the court ordering such a mandamus has the effect of a judgment, and leaves the defendant without discretion. *Id.*

4. *Same. Issues in nature of fieri facias. When.* If a mandamus issues to compel the levying and collection of a tax to satisfy a judgment of that court, it issues in the nature of an ordinary *fieri facias*, and is not an original proceeding, but simply a mode of executing the judgment of the court.

MANDAMUS *Continued.*

5. *Constitution. Construed. Merchants' tax.* The provision of the Constitution relied upon in this case is construed to mean simply that no merchants' tax, that is, the privilege tax upon merchants, shall be levied upon that part of their capital used in buying goods to sell to non-residents, but the property tax upon merchants shall be uniform with the general property tax.

MARRIED WOMEN.

See GARNISHMENT, 1; HOMESTEAD, 1, 2; LIFE INSURANCE.

1. *Separate property. Insurance collected and reinvested. Husband's consent. Reduction into possession.* A married woman collected the insurance on a house which she had owned, and invested it again in real estate, her husband assenting to her control and disposition of the fund. *Held*, that the money so collected was not so reduced into the possession of the husband that the equity of the wife was defeated. *Cox* v. *Scott*, 305.

2. *Chose in action. Reduction into possession.* A chose in action of a married woman, though it accrues during coverture, does not become the property of the husband unless reduced into his possession. *Id.*

3. *Wife's earnings. Reduction into possession* Personal property, though purchased with the earnings of a married woman, is subject to the husband's debts, though he did not reduce the money to possession, where there is no separate estate. *Id.*

4. *Semble*, that a wife is a competent witness in her own behalf, though her husband be a necessary party to the same case with her. *Id.*

5. *Power to dispose of separate property. Mortgage.* Holmes Erwin sold a lot to Edward Clark, in trust for his wife Ellen, the deed providing that said Ellen should have the power of disposing of said property by deed or will, as if she was a *feme sole*. *Held*, that this power carried with it the power to mortgage. Same principle decided in the unreported case of *Williams* v. *Whiteman*, September term, 1875, at Jackson. This case distinguished from the case of *Temple* v. *Head*, 4 Heis., 34, where the power conferred upon the *feme covert* was to dispose of by last will and testament, or by deed of gift. *Steifel* v. *Clark*, 466.

6. *Correction of certificate. Clerk Notary public.* The provision of the Code for correction of a certificate of privy examination by the clerk, by making oath in open court to the truth of such correction, applies to a notary public as well as to a clerk, and the correction may be made upon the notary making the oath required in the court of another State It makes no difference that the correction was made after the defective probate had been asserted by the pleadings. *Brinkley* v. *Tonemy*, 275.

MARRIED WOMEN—*Continued.*

7. *Evidence. Contracts.* The suit being against the defendant personally, and not as the representative of her husband, plaintiff could testify as to a contract made with the deceased husband. *Johnson* v. *Hall*, 351.

8. *Separate estate. Profits.* The profits and accretions of a wife's separate estate in land enure to the wife, and cannot be seized for the husband's debts, unless it be clearly shown by the creditor that the wife has relinquished to the husband her separate interest in said profits and accretions. *Nelson* v. *Hollins*, 553.

9. *Deeds. Privy examination.* A certificate by a commissioner, appointed under sec. 2077 of the Code, for the privy examination of a married woman as to her deed, which omits the words "and having been examined," is fatally defective, and the deed is void. *Ellett* v. *Richardson*, 293.

10. *Bills and notes. Public policy.* A note executed by a husband, living separate from his wife, to a trustee for her, as an inducement for her to return to him, is *undum pactum*, and contravenes public policy, and is not tolerable in law. *Copeland* v. *Boaz*, 223.

MECHANIC'S LIEN.

See HOMESTEAD, 5.

MINOR.

County court may bind, when. Child not to be bound without mother's consent, when. An order of the county court binding a minor to involuntary servitude, is not conclusive upon him or the mother, when made upon the court's own motion, without notice to either the minor or the mother, and the court having determined the existence of none of the facts necessary to make their action proper in such cases.

The court say: "The failure of the mother, upon being subsequently informed of the order of the court, to take action to repudiate the binding, would not necessarily render the action of the court valid, especially as against the minor himself, upon the supposition that he had been abandoned by the mother. If the mother be able to support the child, it cannot be bound without her assent in open court. If the mother be not able, or if she has abandoned him, yet if the child is able to support and take care of himself by his own labor, we think the court has no power to bind him, without he is in some way a party to the proceeding so as to bind or estop him, which we think does not appear in this case." *Norris* v. *Stephens*, 433.

MORTGAGE.

See BILLS AND NOTES, 7, 16, 17, 18; DEEDS OF TRUST, 1; HOMESTEAD, 2; MARRIED WOMEN, 5; SUBROGATION, 1; VENDOR'S LIEN.

MORTGAGE—*Continued.*

Property not in esse. A crop yet to be planted, is the subject of a valid mortgage. Such an assignment is held by the court to be lawful. *Watkins* v. *Wyatt*, 250.

MULTIFARIOUSNESS.

See CHANCERY PRACTICE, 1.

OFFICE AND OFFICERS.

See BILLS AND NOTES, 13; CONSTITUTIONAL LAW, 4; CRIMINAL LAW, 1, 2, 4, 5; JUDGMENT AND DECREES; MARRIED WOMEN, 6, 7; PLEADING AND PRACTICE, 1, 4; ACTIONS.

1. *Forfeiture of fees by officers. When.* In cases where the Legislature has made the performance of any duty pertaining to an office a condition upon which fees or salaries are to be paid, the officer is not entitled to demand his fees until such duties are performed. *Maynard* v. *State*, 225.

2. *Same. Clerks of circuit court.* Clerks of circuit court shall forfeit their costs, as provided in sec. 5242 and sub-secs. 6 and 7 of the Code. *Id.*

3. *Magistrates. Fees for taking down proof in criminal cases.* Under sec. 5062 of the Code, under the caption, "proceedings before committing magistrates," it is enacted: "The evidence of witnesses examined shall be reduced to writing by the magistrate, or under his direction, and signed by the witnesses respectively." For such services magistrates are allowed the same fee as prescribed by law for the taking of depositions. *State* v. *Anthony*, 227.

4. *Clerks. Fees. Costs. Sec.* 4551. *Sub-secs.* 10, 3220, 5570, 4560. *Subsections construed.* Several questions of clerk's costs are decided in this case, too numerous to be set out in head note. *Perkins* v. *State*, 1.

5. *District attorney-general. Fees of. Costs. Motions against circuit clerks.* The district attorney-general is entitled to a fee of $2.50 only in each case of failure by clerk to enroll cases determined in his court, such failure being a misdemeanor. *Wright* v. *Shelby County*, 145.

6. *Same. Same. Statute of limitations.* In pursuance of his duty under sec. 3228 of the Code, the district attorney-general can have his motion against delinquent clerks at any time, until the proper statute of limitations forms a bar. *Id.*

7. *Same. Same. County liable for fees. When.* In cases where execution upon the motion is returned *nulla bona*, the county in which such motion is made is liable for fees of the district attorney-general. *Id.*

PARTNERSHIP.

Statute of six years does not run against partner. When. No right of action for an account accrues to a retiring partner that can be "effectually prosecuted" until the liquidating partners, having possession of the assets, have settled the debts of the partnership. The statute of six years, in such case, does not run against the retiring partner. *Miller* v. *Harris*, 101.

PEDDLERS.

1. *Privilege tax. Sewing machine.* Sec. 23 of art. 2 of the State Constitution, which ordains that "the Legislature shall have power to tax merchants, peddlers and privileges in such manner as they may from time to time direct," and sec. 30 of art. 2, ordaining that "no article manufactured of the produce of the State shall be taxed otherwise than to pay the inspection fees," are not repugnant to secs. 8 and 10 of the Constitution of the United States regulating commerce between the States. *Howe Machine Co.* v. *Cage*, 518.

2. *Same. Same.* These two clauses must be construed *pari passu*, from which it appears that a distinction is drawn between a tax upon the article *in specie*, and the tax upon the privilege of peddling the article, and confers upon the Legislature the power to levy a tax upon the privilege. *Id.*

3. *Same. Same.* The act of the Assembly which enacts that "all peddlers of sewing machines, or peddlers selling by sample, must pay a tax of ten dollars," and that exempt articles manufactured of the produce of the State from taxation, are not in contravention of the provision of the Constitution of the United States authorizing Congress to regulate commerce between the States. *Id.*

PERSONS UNDER DISABILITY.

1. *Infant. Torts. Liability.* An infant is liable for his torts, and his property may be taken in execution to satisfy a fine and costs in a criminal prosecution. *Dial* v. *Wood*, 296.

2. *Liability to surety for fine and costs.* Where, in such case, the infant gives security for the fine and costs to prevent being held in custody, and his surety pays the same, and on motion takes judgment over against the minor, this judgment, though arising out of a civil contract, is valid and binding upon the infant. *Id.*

3. *Execution. Guardian. Garnishment.* Such judgment may be enforced in favor of the surety against the property of the infant by garnishment served upon the guardian. *Id.*

4. *Guardian ad litem.* Ordinarily, an idiot or lunatic should defend a suit by his committee; but if he has no committee, another person will be appointed his guarcian *ad litem* to defend the suit. *Steifel* v. *Clark*, 466.

PLEADING AND PRACTICE.

See Bills and Notes, 10, 13; Redemption, 2.

1. *Attachment. Affidavit for not sworn to. Clerk's failure to sign the writ. May be had in forma pauperis. When.* The fact that the clerk failed to attest that the affidavit had been sworn to, is not fatal to an attachment, but his failure to sign the writ renders it void, and cannot be cured by amendment. An ancillary attachment may be had *in forma pauperis*. *Wiley* v. *Bennett*, 581.

2. *Qui tam actions. Bonds. Pauper's oath.* *Qui tam* actions must be prosecuted with bond and security. The right to sue *in forma pauperis* is a personal right, not a privilege to be exercised in a representative capacity. *Johnson* v. *Hunter*, 185.

3. *Judgments and decrees. Actions. Justice of the peace.* An action may be maintained in the circuit court on a judgment had before a justice of the peace, under which execution has issued and levied upon land, and returned into the circuit court for condemnation. *Boyd* v. *Mann*, 349.

4. *Before justice. Certiorari. Petition for. Mistake not sufficient to sustain.* Plaintiff, in a petition for *certiorari* to bring up cause from a justice of the peace, alleged that he had a good defense to the action, but understood the case to be set for the 26th, when it was tried on the 19th, and that he did not discover his mistake until too late to appeal. *Held*, not sufficient to support the petition. *Cox* v. *Kent*, 492.

5. *Supplying lost papers. Affidavit.* The fact that a party to a suit, instead of the clerk, makes affidavit of loss of papers, is not reversible error. *Johnson* v. *Hall*, 351.

PRINCIPAL AND AGENT.

See Banks and Banking; Criminal Law, 15.

PRINCIPAL AND SURETY.

See Bills and Notes, 9, 14, 17, 18; Chancery Practice, 2, 7, 8; Chancery Sale; Persons Under Disability, 2.

Set-off. Bills and notes. In an action against principal and surety, a debt due to the principal alone, may be set off against the plaintiff's suit. *Guggenheimer* v. *Rosenfeld*, 533.

PUBLIC SCHOOL LAW.

Violated. When. A contract to set out trees, shrubbery and evergreens around a school-house, or a contract to enclose a school-house with a fence, and to furnish furniture for the room, is such a contract as the Board might make, but, when made with a director, it is in violation of the 19th section of the public school law, and is a misdemeanor under sec. 4596 of the Code. *State* v. *McGrady*, 559.

RAILROADS.

See Corporations, 11, 12.

1. *Common carriers. Liability for freight lost. Connecting lines. Privity. Burden of proof. Evidence.* The last of a series of connecting lines over which freight is transported, is liable for loss or damage, subject to the limitations stipulated for in the contract of shipment with the first line, unless it appears that the loss did not occur on the road sued. The burden is upon said road to show that the loss did not occur on its line. *Railroad Co.* v. *Holloway*, 188.

2. *Same. Same.* A stipulation that the claim for loss must be made at the time the goods are delivered, will not protect the company, where the claim is made in a reasonable time after the loss is ascertained. *Id.*

3. *Same. Duck River Valley Narrow Gauge Railroad charter.* The charter of the Duck River Valley Narrow Gauge Railroad discussed, and held valid, except as to powers sought to be conferred by it which are included in the charters granted by the Legislature to the Nashville and Decatur and the Tennessee and Alabama railroad companies. *Williams* v. *Railroad Co.*, 488.

4. *Same. Marshall county bonds.* The bonds issued by Marshall county in payment of her subscription to the capital stock of said company, held valid and binding on the county. *Id.*

REDEMPTION.

See Chancery Practice, 7.

1. *Of real estate. Partial payments.* The purchaser may receive partial payments or demand the full amount. In the absence of any other agreement, partial payments must be understood, with reference to the redemption laws, and by the favor of the purchaser. If at the end of two years the whole amount be not paid, the purchaser becomes debtor to the original owner to the extent of the amount paid, which may be recovered either in chancery or by an action at law. *Rambo* v. *Donelly* 418.

2. *Sale of land. Pleading and practice.* A tender of the proper amount of money to the purchaser of land sold under a deed of trust, with an offer to give the credit on his judgment, by a *bona fide* creditor, who seeks to redeem, is sufficient to secure his right against such purchaser, though the tender be refused by him. *Burton* v. *Robinson*, 364.

3. *Judgments and decrees. Revivor. Administrator.* Where a debtor, whose land has been sold to satisfy one judgment, and bought by the creditor, dies after a second judgment is obtained, but before the redemption of the land, it is not necessary for the second judgment creditor to revive his judgment against the heirs, in order to redeem. *Bledsoe* v. *McCorry*, 320.

REGISTRATION.

See BILLS AND NOTES, 16; FRAUDULENT CONVEYANCE, 1; VENDOR'S LIEN.

REPLEVIN.

See PLEADING AND PRACTICE, 5; ACTIONS.

1. *Will not lie, when. Action.* The action of replevin does not lie to recover part of a chattel. *Jackson* v. *Stoddard*, 260.

2. *Property lost.* By statute, where the property attached is replevied, the bond represents the debt and stands in lieu of the property, and judgment may be given on the bond for the value of the property, where it has been lost before trial. *Epperson* v. *Van Pelt*, 73.

REVENUE LAWS.

Construction of acts. Sale before payment of tax on whisky, void only when made with intent to defraud the revenue. Contracts contrary to acts of Congress. A sale of brandy before payment of the tax imposed by the revenue laws, is not void unless made with intent to avoid the payment of the revenue. *Rose* v. *Crow*, 420.

SALE OF LAND.

See CHANCERY SALE; DEEDS OF TRUST, 3; REDEMPTION, 2; VENDOR'S LIEN.

Verbal Contract. Improvements. When a vendor of land, by verbal sale, puts the vendee in possession, and the vendee occupies and uses the land for a time, and then abandons the contract and refuses to take the land, in suit by the vendor against the vendee for use and occupation (the vendor being in no default), the vendee will not be allowed to set off the value of improvements made by him while in possession against the vendor's claim for use and occupation. *Guthrie* v. *Holt*, 527.

SPECIAL JUDGES.

See CRIMINAL LAW, 10.

SPECIAL LEGISLATION.

Unconstitutional. Municipal corporations. Bond for costs. An act providing that cities of a certain population and over may institute suits, etc., without giving bond for costs, is unconstitutional and void. *Memphis* v. *Fisher*, 239.

STATUTES.

Construction of. Where the latter clause in a section of an act is distinct and separable from the first, it will not render the whole section invalid necessarily for the one to be declared void. *Tillman* v. *Cocke*, 249.

STATUTES CITED.

1869–70, ch. 69 242
1875, ch. 13, secs. 44, 118 472
1875, ch. 130, sec. 2 584
1831, ch. 9 325
1875, ch. 83, sec. 11 202
1845, Dec. 11, sec. 38 546

STATUTE OF FRAUDS.

See CONTRACTS, 3.

STATUTE OF LIMITATIONS.

See ADMINISTRATION, 1, 2; BILLS AND NOTES, 6; CORPORATIONS, 9; GARNISHMENT, 2, 3; HOMESTEAD, 4; PARTNERSHIP; SURETY, 1, 3.

1. *Vendor's lien.* Where the legal title has passed to the vendee, and no lien was retained in the deed, the notes given for the purchase money may become barred by the statute. The implied lien of the vendor is then also extinguished. *Fisher* v. *Fisher*, 71.

2. *Request for delay.* Where a request for delay is made, the party agreeing not to take advantage of the statute of three years for non-resident creditors, he will not be estopped from pleading the statute of six years in defense of the debt. *Maloney* v. *Wilson*, 403.

3. *Wills. Administrators and executors. Trusts.* Where a will directs that certain lands shall be sold for the payment of debts generally, this does not create such a trust in favor of creditors as will prevent the running of the statute of limitations against the collection of their claims out of this specific property. The creditors must still present and collect their claims through the personal representative as such, subject to the same limitations that apply in other cases. *Hubbard* v. *Epps*, 231.

4. *Same. Same. Non-residents.* Where the testatrix lived and died in Virginia, leaving land in this State, in a suit by creditors from that State seeking to subject the land in this to their claims, our statutes in favor of the personal representative here are held to apply, though they bar the debts of such creditors, whether the laws of Virginia would recognize them or not. *Id.*

5. *Executors and administrators. Insolvent proceedings. Chancery practice. Judgment on suit against Executor within seven years. Bill filed after seven years to subject realty.* Where suit against a personal representative is brought within the time prescribed by law for such actions, the bar of the statute is saved as to the whole assets of the estate, embracing

realty, descended to the heir, which, upon exhaustion of the personalty, may be reached by bill in chancery for that purpose, filed more than seven years after death of the testator, the running of the statute being defeated by the commencement of the original suit within two and a half years from the qualification of the executor, which was diligently prosecuted to judgment. *Wooldridge* v. *Page*, 325.

6. *Same. Same. Supreme court. Scire facias.* The judgment creditor in this case sued out a *scire facias* in the supreme court, against the heirs, to show cause why the judgment should not be revived, and satisfied out of the real estate descended to them. The court say: To a *scire facias* sued out by a judgment creditor, to subject the realty descended to the heir, the latter may make all defenses that were, could or should have been made by the personal representative in the original action, the judgment against the personal representative being only *prima facie* evidence of indebtedness against the heir. He may also make an issue with the personal representative as to the mismanagement and waste of the personalty. It is doubtful, therefore, whether the supreme court, a court of appellate jurisdiction only, has jurisdiction of such writ of *scire facias*. In this case the question need not be decided, because there was no plea of fully administered in the original action, without which there can be no further proceedings at law against the heir. *Id.*

SUBROGATION.

1. *Mortgage. Bills and notes. Administration. Insolvent proceedings. Chancery practice.* The heirs of an estate, on the assumption that it was solvent, paid off certain mortgages on lands; subsequently, on discovering their mistake, they claim to be subrogated to the rights of the mortgagors against the lands. *Held*, that if the facts and circumstances show definitely that at the time of payment such right was not intended to be exercised, or could not be exercised without injustice to others, then no such right can be held to exist. They cannot claim benefit of subrogation by any *post facto* intention, wish or interest growing out of subsequent wants. The right and intention must both concur to make a case of subrogation. *Belcher* v. *Wickersham*, 111.

2. *Same. Same. Judgments and decrees. Lien.* Nor are the heirs in such case, entitled to any priority over other general creditors, because they have paid off judgments had against their intestate during his lifetime, when the lien of the judgments so paid had expired, by not having been enforced within the twelve months provided by law. *Id.*

3. *Same. Same. Estoppel.* If the heirs have had their claims proved before the clerk and master, and had them allowed as simple creditors in his report, it being confirmed without exception, the court say:

SUBROGATION—*Continued.*

It is probable that this of itself would operate as an estoppel upon the heirs, as showing a purpose not to rely on the right of subrogation. The parties may come in on the footing of their claim for debts paid, by virtue of such report and its confirmation, by a decree of the court, which has not been disturbed, and cannot now be assailed. *Id.*

SUPERSEDEAS.

1. *How and in what cases supreme court can exercise it.* Under the authority given the supreme court by secs. 3933, 3934, 4512 and 4513 of the Code, to supersede interlocutory orders and decrees, that court can simply suspend or supersede, for the time being, the execution of such orders and decrees as are of a nature to be actively and affirmatively enforced, and are *in fieri;* but have no power, in this mode, to reverse the action of the inferior court, or to set aside, or annul, or supersede orders or decrees, which are merely of a negative or prohibitory character, or such as have been executed. *Redmond* v. *Redmond*, 561.

2. *Same. Chancellor's fiat.* Nor has the supreme court, in a proceeding of this character, the power to supersede the *fiat* of a chancellor awarding extraordinary process.

SURETY.

See Bail Bond; Bills and Notes, 1, 2, 18; Chancery Sale.

1. *Liability of on note. Though administrator of his deceased principal is protected by the statute of limitations.* Although the administrator of a principal in a note may defeat a recovery upon the note by the plea of the statute of limitations, yet the exoneration of such administrator does not relieve the sureties of his intestate from liability. *Reeves* v. *Pulliam*, 153.

2. *Remedy of surety.* When the surety on such a note is compelled to pay the debt, he then has cause of action against the administrator of either the principal for the amount so paid, or the administrator of a co-security for *pro rata* contribution. *Id.*

3. *Same. Right of action accrues. When. Statute of limitations.* When the surety is entitled to his motion, upon rendition of his judgment, yet his cause of action is the payment of the judgment, and the statute begins to run from that time, and not from the rendition of the judgment. *Id.*

TAXATION.

See Constitutional Law, 1, 2, 3, 5, 6, 7; Corporations, 1, 2, 4, 7; Mandamus, 5; Telegraph Lines; Peddlers, 1, 2, 3.

TAXATION—*Continued.*

1. *Merchant's tax. Merchant. License to sell.* A trustee to whom goods are assigned, and who sells them from the store, but without replenishing the stock, is not a merchant, within the meaning of the law, so as to be bound to take out license or pay tax in order to sell the goods. *Ayrnett* v *Edmundson*, 610.

2. *Exemption. Corporation. Railroad. Charters.* The word "exemption" is not comprehended within the words "rights and privileges," as applied to a corporation claiming a right of exemption from taxation by virtue of a section of its charter, conferring upon it the *rights and privileges* of a like coporation, which latter corporation was by express terms of the charter exempt from taxation. *Wilson* v. *Gaines*, 546.

3. *Same. Public policy.* Exemptions from taxation are contrary to public policy, and can only be allowed when granted in clear and unmistakable terms. If the language in which they are claimed to be granted leaves it doubtful, the benefit of the doubt must be given to the State, the life of which is taxes. *Id.*

4. *Exemption from taxation not assignable.* An exemption from taxation is personal to the corporation or individual possessing it, and is not assignable. *Id.*

TELEGRAPH LINES

Taxable. Telegraph lines are considered as partaking of the nature of realty, in analogy to the new doctrine that railroads and rolling stock are so treated, and consequently under the act of March 24, 1875, such property is held by the court liable to State and county tax, notwithstanding it also pays a privilege tax. *Telegraph Co. v. State*, 509.

TRUSTEES.

See DEEDS OF TRUST, 4; GARNISHMENT, 3; TAXATION, 1.

1. *Testamentary. Not required to give bond. When.* Testamentary trustees are not governed by the provisions of the Code, sec. 1974, *et seq.*, in regard to giving bond, filing inventories, etc. *Kerr* v. *White*, 161.

2. *Same. Chancery practice.* Before a court of equity will interfere with the execution of a testamentary trust by a trustee, some danger from the misconduct or incapacity of the trustee must be shown, or at least apprehended, with good cause. *Id.*

USURY.

See BILLS AND NOTES, 11, 12.

VENDOR'S LIEN.

See HOMESTEAD, 5; STATUTE OF LIMITATIONS, 1.

Mortgage. Deed of trust. Sale of land. Registration. Statement of case: A vendor sells and conveys land by deed absolute upon its face, acknowledging the full payment of the purchase money, and this deed is duly registered. A creditor of the vendee, desiring to obtain security for a pre-existing debt, procured the vendee to execute a deed of trust upon the land to secure the debt, the deed stipulating for delay as usual upon the part of the creditor. The benefits of this deed were formally accepted by the trustee, and creditor joined in its execution; the deed was then duly registered. Some years afterward, when the trustee was proceeding to advertise the property for sale under the deed, the vendor files his bill claiming a lien for unpaid purchase money, and claiming priority over the trust creditor. *Held*, that a vendor who has thus conveyed without reserving an express lien, has no specific and fixed lien upon the property, and acquires none until his bill is filed for the purpose; and if, before this be done, any other creditor secures a fixed or specific lien upon the property, he will prevail over the vendor, and a creditor who accepts a deed of trust to secure a debt stands in this attitude. *Sharp v. Fly*, 4.

WILLS.

See STATUTE OF LIMITATIONS, 3.

1. *Evidence.* It is admissible to prove the statement of the testator that he signed the will in the presence of the subscribing witnesses. *Beadles v. Alexander*, 604.

2. *Same. Act of 1869–70 construed.* Under the act of 1869–70, T. & S. Code, sec. 3813, *a*, *b*, *c*, *d*, the devisees and legatees under the will are competent witnesses to prove the declarations of the testator. *Id.*

3. *Same. Presumption.* When the fact that the signature of the subscribing witnesses are genuine is established, and nothing else appears, the presumption that the attestation was in the presence of the testator is conclusive. But if there be positive testimony on the subject by the subscribing witnesses or otherwise, it then becomes a question for the jury to settle upon all the evidence. *Id.*

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